

**Oaktree Capital Management, LLC and TBR Property, LLC, a single employer, d/b/a Turtle Bay Resorts, and Benchmark Hospitality, Inc. and UNITE HERE! Local 5.** Cases 37-CA-6601-1, 37-CA-6642-1, 37-CA-6669-1, 37-CA-6691-1, 37-CA-6730-1, 37-CA-6753-1, 37-CA-6756-1, 37-CA-6768-1, 37-CA-6816-1, 37-CA-6826-1, 37-CA-6827-1, 37-CA-6835-1, 37-CA-6840-1, 37-CA-6875-1, 37-CA-6877-1, and 37-CA-6878-1

March 31, 2009

### DECISION AND ORDER REMANDING

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On May 24, 2006, Administrative Law Judge Joseph Gontram issued the attached decision. The filings before the National Labor Relations Board in connection with review of the judge's decision are the Respondents' amended exceptions and the General Counsel's answering brief, limited exceptions, and supporting brief.<sup>1</sup>

The Board<sup>2</sup> has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,<sup>3</sup> findings,<sup>4</sup> and conclusions, as

<sup>1</sup> On March 30, 2007, the Board granted the General Counsel's motion to strike the Respondents' original exceptions and brief because they failed to comply with the Board's rules. The Board afforded the Respondents an opportunity to resubmit their documents in compliant form. Thereafter, the Respondents filed amended exceptions and an amended supporting brief. The General Counsel filed a motion to strike these documents, and the Respondents filed an opposition and commentary in opposition to the motion. On May 7, 2007, the Board rejected the Respondents' commentary. On June 19, 2007, the Board, Member Schaumber dissenting, granted the General Counsel's motion in part by striking the Respondents' amended brief for the continued failure to comply with the Board's rules. The Board accepted the Respondents' amended exceptions. On December 21, 2007, the Board denied the Respondents' motion for reconsideration of the order striking the amended brief.

<sup>2</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

<sup>3</sup> The Respondents except to many of the judge's evidentiary and procedural rulings. Sec. 102.35 of the Board's Rules and Regulations provides, in pertinent part, that a judge should "regulate the course of the hearing" and "take any other action necessary" in furtherance of the judge's stated duties and authorized by the Board's Rules. Thus, the Board accords judges significant discretion in controlling the hearing and directing the creation of the record. See *Parts Depot, Inc.*, 348 NLRB 152 fn. 6 (2006), enfd. mem. 260 Fed. Appx. 607 (4th Cir. 2008). Further, it is well established that the Board will affirm an evidentiary ruling of an administrative law judge unless that ruling constitutes abuse of discretion. See *Aladdin Gaming, LLC*, 345 NLRB 585,

modified below, and to adopt the recommended Order as modified and set forth in full below.

The Union represents approximately 360 employees in the Respondents' resort complex on the island of Oahu in Hawaii. The unfair labor practice allegations in this case arose out of the Union's campaign to secure a new collective-bargaining agreement after the former contract expired on November 25, 2003. The Union and employees engaged in rallies, picketing, and a boycott of the resort. The complaint alleged that the Respondents' reaction to this campaign included multiple violations of Section 8(a)(1), (3), and (5) of the Act from February 2004 through September 2005.

We affirm the judge's findings, for the reasons he states, that the Respondents<sup>5</sup> committed numerous violations of Section 8(a)(1).<sup>6</sup>

587 (2005), petition for review denied sub. nom. *Local Joint Executive Board of Las Vegas v. NLRB*, 515 F.3d 942 (9th Cir. 2008). After a careful review of the record, we find no abuse of discretion in any of the challenged rulings.

Member Schaumber agrees with the proposition for which *Parts Depot* is cited above, though he adheres to his dissent in that case.

<sup>4</sup> The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondents also contend that some of the judge's findings are the product of bias. On careful examination of the judge's decision and the entire record, we are satisfied that these contentions are without merit.

<sup>5</sup> We agree with the judge, for the reasons he states, that Respondents Oaktree Capital Management, LLC (Oaktree) and TBR Property, LLC (TBR) are a single employer, and TBR and Benchmark Hospitality, Inc. (Benchmark) are joint employers. We find it unnecessary to pass on the judge's further finding that TBR's single-employer status with Oaktree brings Oaktree within the ambit of TBR's joint-employer status with Benchmark. The remedy would remain the same. See *Summit Express, Inc.*, 350 NLRB 592, 596-597 (2007) (each component of single employer is jointly and severally responsible for the remedy for the unfair labor practices of the others); *Le Rendezvous Restaurant*, 332 NLRB 336, 337 (2000) (joint employers jointly liable for the remedial obligations of each other).

<sup>6</sup> In affirming the finding that the Respondents violated Sec. 8(a)(1) by telling union representatives that they were trespassing and had no right to be on the property (contrary to their contractually-established right of access), by issuing trespass notices to them, by evicting them from the resort, and by summoning law enforcement officials to remove or assist in removing them, we rely only on the judge's analysis of the events of February 14 and 18, 2004. In affirming the finding that the Respondents unlawfully followed union representatives and eavesdropped on their conversations with employees, we rely only on the judge's analysis of the events of February 10 and March 3 and 10, 2005. In affirming the finding that the Respondents unlawfully photographed or videotaped union representatives and employees who are engaged in peaceful demonstrations, we rely only on the analysis of the events of March 25, 2004. Finally, in affirming the finding that the Respondents unlawfully prevented union representatives and employ-

We also affirm the judge's findings that the Respondents violated Section 8(a)(3) and (1) of the Act by discharging employee Mark Feltman, by suspending employee Timothy Barron, and by warning employee Jeannie Martinson.

With respect to Feltman, the judge found that the Respondents' asserted defenses were pretextual and therefore did not raise any question of dual motivation under the *Wright Line* test.<sup>7</sup> We find instead that the Respondents proved the existence of a legitimate reason for disciplinary action, but that the discharge was nevertheless unlawful. It is not sufficient for a respondent employer simply to produce a legitimate basis for the action in question or to show that the legitimate reason factored into its decision. *T. Steele Construction, Inc.*, 348 NLRB 1173, 1183 (2006). Rather, it must persuade by a preponderance of the evidence that it would have taken the

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ees from accessing the public beaches adjacent to the resort, we rely only on the analysis of the events of February 12, 2004. We find it unnecessary to pass on the judge's findings that the Respondents committed similar violations on other dates inasmuch as such findings would be cumulative and would not materially affect the remedies ordered in this case. See *Strand Theatre of Shreveport Corp.*, 346 NLRB 523 fn. 2 (2006), *enfd.* 493 F.3d 515 (5th Cir. 2007).

There are no exceptions to the judge's findings that the Respondents violated Sec. 8(a)(1) by maintaining certain overly broad rules in its "Rules and Regulations" and "Staff Handbook" manuals. There are also no exceptions to the judge's dismissal of the 8(a)(1) allegations concerning two of the rules, an allegation concerning the Respondents' summoning of the police to the resort on August 6, 2004, to remove Union Representative Nate Santa Maria, and allegations that the Respondents followed Union Representatives Kimberly Harmon and Laura Moye and eavesdropped on their conversations with employees on January 19, 2005.

<sup>7</sup> 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983). Under *Wright Line*, the General Counsel bears the initial burden of showing by a preponderance of the evidence that protected conduct was a substantial or motivating factor in the adverse employment action. If the General Counsel makes the required initial showing, the burden then shifts to the employer to show, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union activity. See *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

We agree with the judge that the General Counsel met his initial burden. We note that the judge described this burden in terms of four evidentiary elements, rather than the Board's traditional description of three elements: union or other protected activity by the employee, employer knowledge of that activity, and antiunion animus on the part of the employer. *Internet Stevensville*, 350 NLRB 1349, 1357 (2007). Member Schaumber observes that the Board and the circuit courts of appeals have variously described the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line*, sometimes adding as an independent fourth element the necessity for there to be a causal nexus between the union animus and the adverse employment action. See, e.g., *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). As stated in *Shearer's Foods*, 340 NLRB 1093, 1094 fn. 4 (2003), since *Wright Line* is a causation standard, Member Schaumber agrees with this addition.

same action in the absence of protected conduct. *Carpenter Technology Corp.*, 346 NLRB 766, 773 (2006). We find that the Respondents failed to meet this rebuttal burden.

According to the Respondents, they discharged Feltman because he cursed employee Derek Mendivil when Mendivil failed to respond to Feltman's question about Mendivil's court appearance on behalf of the Respondents. However, Feltman's discipline was more severe than that imposed by the Respondents on at least five other occasions involving employees who used bad language and/or engaged in harassment. Further, Director of Human Resources Nancy Ramos acknowledged that employees commonly used similar bad language and that she would have no staff if employees were disciplined for such utterances. We therefore conclude that the Respondents failed to prove that they would have discharged Feltman, even absent his participation in union activities.

We also affirm the judge's findings, for the reasons he states, that the Respondents violated Section 8(a)(5) of the Act by unilaterally changing the access provisions of the collective-bargaining agreement and by refusing or unreasonably delaying in providing the Union with requested information relevant to its duties as the employees' bargaining representative.

However, we do not agree with the judge's analysis of the allegation that the Respondents also violated Section 8(a)(5) on and after January 28, 2005, when they required union agents to pay for parking, which the Respondents had previously validated, when visiting the resort for representational purposes.

The judge found that "[t]here was no evidence of the amount the Respondents require union representatives to pay for parking," and that therefore he was "unable to conclude that the change in parking privileges was a significant change that would require the Respondents to bargain before making the change." The General Counsel contends in exceptions that the judge erroneously failed to consider record evidence of three LM-10 forms filed with the U.S. Department of Labor as well as explanatory testimony by Director of Human Resources Ramos that she completed these forms and that they reflected an independent investigator's determination of the monetary amounts of the validated parking that the Respondents provided the Union's representatives. The most recent form, dated January 1, 2005, references parking fees of \$20 per day/2 days per week/12 weeks/\$40 = \$480; the 2004 and 2003 forms reference parking fees of \$20 per day/2 days per week/52 weeks/\$40 per week = \$2080. Therefore, contrary to the judge, there is evidence of the monetary amounts at issue for the parking

privileges unilaterally revoked by the Respondents. Accordingly, we shall sever and remand this issue to an administrative law judge with directions to consider this evidence and to issue a supplemental decision analyzing whether the Respondents violated Section 8(a)(5) as alleged.

### ORDER<sup>8</sup>

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondents, Oaktree Capital Management, LLC and TBR Property, LLC, a single employer, d/b/a Turtle Bay Resorts, and Benchmark Hospitality, Inc., Honolulu, Hawaii, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with UNITE HERE! Local 5 (the Union), as the exclusive bargaining representative of their employees, by failing and refusing to furnish, or by unreasonably delay in furnishing, the information requested by the Union in its letters of April 28, August 30, and September 13, 2004.

(b) Unilaterally changing the access provision of the collective-bargaining agreement with the Union until an agreement is reached or there is an impasse on all mandatory subjects of bargaining.

(c) Maintaining the rules of conduct applicable to employees that have been found to violate Section 8(a)(1) of the Act, or similar rules, and that are set forth in paragraph 5 of the judge's conclusions of law.

(d) Maintaining overly broad rules that limit employees' right to discuss their wages and working conditions.

(e) Maintaining overly broad rules that prohibit employees from soliciting or distributing literature in non-work areas and during nonworktime.

(f) Maintaining overly broad rules that prohibit employees' presence on Turtle Bay property.

(g) Maintaining overly broad rules that restrict employees' rights to engage in protected concerted activity.

(h) Telling representatives of the Union that they are trespassing and have no right to be on Turtle Bay prop-

erty contrary to their contractual right to be on the premises.

(i) Issuing trespass notices to representatives of the Union contrary to their contractual right to be on the premises.

(j) Evicting representatives of the Union from Turtle Bay contrary to their contractual right to be on the premises.

(k) Summoning law enforcement officials to remove or to assist in removing union representatives contrary to the union representatives' right to be on the premises.

(l) Telling union representatives that they are not permitted to collect dues at Turtle Bay contrary to their contractual right of access.

(m) Photographing or videotaping union representatives and employees who are engaged in lawful demonstrations.

(n) Following union representatives in the Turtle Bay hotel when the union representatives are engaged in union activities pursuant to the contractual access provision.

(o) Eavesdropping on conversations between union representatives and employees.

(p) Preventing union representatives and employees from going to the public beaches adjacent to Turtle Bay's property to engage in Section 7 activities.

(q) Disparaging union representatives and threatening to discipline employees for talking to union representatives.

(r) Threatening to close Turtle Bay in retaliation for protected activity such as demonstrations and boycotts.

(s) Discharging, suspending, disciplining, or otherwise discriminating against any employee for supporting the Union or engaging in protected activities.

(t) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the rules set forth in paragraph 5 of the judge's conclusions of law.

(b) Rescind the overly broad rule in their employee handbook that limits employees' rights to discuss their wages and working conditions.

(c) Rescind the overly broad rule in their employee handbook that prohibits employees from soliciting or distributing literature in nonwork areas and during nonworktime.

(d) Rescind the overly broad rule in their employee handbook that prohibits employees' presence on Turtle Bay property.

<sup>8</sup> We deny the General Counsel's request to include in the recommended Order a provision requiring the Respondents to notify in writing the Honolulu police and city and county of Honolulu Office of Corporation Counsel that the Respondents violated the Act in certain respects. We find no warrant, in the circumstances of this case, for requiring the Respondents to destroy any videotape, pictures, negatives, and other electronic images of union and protected activities. We shall delete this provision from the Order. We observe that the judge omitted from his notice a make-whole provision for the unlawful suspension of employee Timothy Barron. We shall add this provision to the notice. Finally, we shall modify the judge's remedy to provide the full name of the Union at its first mention in the Order and notice.

(e) Rescind the rules and regulations in their staff handbook (Collective-Bargaining Unit Version) and their handbook of rules and regulations that have been found to unlawfully infringe on employees' Section 7 rights.

(f) Provide and give to the Union all of the information requested by the Union in its letters of April 28, August 30, and September 13, 2004.

(g) Continue in full force and effect the access provision of the collective-bargaining agreement with the Union until an agreement is reached or there is an impasse on all mandatory subjects of bargaining.

(h) Within 14 days from the date of the Board's Order, offer Mark Feltman full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(i) Make Mark Feltman and Timothy Barron whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(j) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Mark Feltman, the unlawful suspension of Timothy Barron, and the unlawful discipline of Jeannie Martinson and, within 3 days thereafter, notify the employees in writing that this has been done and that the discharge, suspension, and discipline will not be used against them in any way.

(k) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(l) Within 14 days after service by the Region, post at their facility in Kahuku, Oahu, Hawaii, copies of the attached notice marked "Appendix."<sup>9</sup> Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not al-

tered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since February 2004.

(m) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

IT IS FURTHER ORDERED that the complaint allegation that the Respondents violated Section 8(a)(5) and (1) of the Act by ceasing to validate parking for the union representatives when they visited the Respondents' resort to carry out their union duties is severed from this case and remanded to an administrative law judge for further appropriate action consistent with this decision.

IT IS FURTHER ORDERED, because the Board has been advised that Judge Joseph Gontram is deceased, the issue is remanded to Chief Administrative Law Judge Robert A. Giannasi, who may designate another administrative law judge in accordance with Section 102.36 of the Board's Rules and Regulations.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

## APPENDIX

### NOTICE TO EMPLOYEES

#### POSTED BY ORDER OF THE

#### NATIONAL LABOR RELATIONS BOARD

#### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

<sup>9</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT fail and refuse to bargain in good faith with UNITE HERE! Local 5 (the Union) as the exclusive bargaining representative of Turtle Bay's employees by failing and refusing to furnish, or unreasonably delaying in furnishing, information requested by the Union that is relevant to its duties as your bargaining representative.

WE WILL NOT unilaterally change the union access provision of the collective-bargaining agreement with the Union until an agreement is reached or there is an impasse on all mandatory subjects of bargaining.

WE WILL NOT maintain the rules of conduct applicable to employees that have been found to violate Section 8(a)(1) of the Act, or similar rules.

WE WILL NOT maintain overly broad rules that limit employees' right to discuss their wages and working conditions.

WE WILL NOT maintain overly broad rules that prohibit employees from soliciting or distributing literature in nonwork areas and during nonworktime.

WE WILL NOT maintain overly broad rules that prohibit employees' presence on Turtle Bay property.

WE WILL NOT maintain overly broad rules that restrict employees' rights to engage in protected concerted activity.

WE WILL NOT tell representatives of the Union that they are trespassing and have no right to be on Turtle Bay property contrary to their contractual right to be on the premises.

WE WILL NOT issue trespass notices to representatives of the Union contrary to their contractual right to be on the premises.

WE WILL NOT evict representatives of the Union from Turtle Bay contrary to their contractual right to be on the premises.

WE WILL NOT summon law enforcement officials to remove or assist in removing union representatives contrary to their contractual right to be on the premises.

WE WILL NOT tell union representatives that they are not permitted to collect dues at Turtle Bay contrary to their contractual right of access.

WE WILL NOT photograph or videotape union representatives and employees who are engaged in lawful demonstrations.

WE WILL NOT follow union representatives in the Turtle Bay resort when the union representatives are engaged in union activities pursuant to the contractual access provision.

WE WILL NOT eavesdrop on conversations between union representatives and employees.

WE WILL NOT prevent union representatives and employees from going to any public beach adjacent to Turtle Bay's property to engage in Section 7 activity.

WE WILL NOT disparage union representatives and threaten to discipline employees for talking to union representatives.

WE WILL NOT threaten to close Turtle Bay in retaliation for union and protected activities such as demonstrations and boycotts.

WE WILL NOT discharge, suspend, warn, or otherwise discriminate against any employee for supporting the Union or engaging in protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL furnish to the Union the information it requested in its letters of April 28, August 30, and September 13, 2004.

WE WILL rescind the overly broad rule in our employee handbook that limits employees' rights to discuss their wages and working conditions.

WE WILL rescind the overly broad rule in our employee handbook that prohibits employees from soliciting or distributing literature in nonwork areas and during nonworktime.

WE WILL rescind the overly broad rule in our employee handbook that prohibits employees' presence on Turtle Bay property.

WE WILL rescind the rules and regulations in our staff handbook (Collective-Bargaining Unit Version) and our handbook of rules and regulations that have been found to unlawfully infringe on employees' Section 7 rights.

WE WILL continue in full force and effect with the Union access provision of the collective-bargaining agreement until an agreement is reached or there is an impasse on all mandatory subjects of bargaining.

WE WILL, within 14 days from the date of this order, offer Mark Feltman full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL make Mark Feltman whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL make Timothy Barron whole for any loss of earnings and other benefits resulting from his suspension, less any net interim earnings plus interest.

WE WILL, within 14 days from the date of this order, remove from our files any reference to Feltman's unlawful discharge, Barron's unlawful suspension, and Jeannie Martinson's unlawful warning, and WE WILL, within 3 days thereafter, notify each of them in writing that this

has been done and that the discharge, suspension, and warning will not be used against them in any way.

OAKTREE CAPITAL MANAGEMENT, LLC AND  
TBR PROPERTY, LLC, A SINGLE EMPLOYER,  
D/B/A TURTLE BAY RESORTS, AND BENCHMARK  
HOSPITALITY, INC.

*Peter S. Ohr, Esq. and Meredith A. Burns, Esq., for the General Counsel.*

*Daniel Berkley, Esq. and Mark S. Posard, Esq. (Gordon & Rees, LLP), of San Francisco, California, for the Respondents.*

*David A. Sgan, Esq. (Gill & Zukeran), of Honolulu, Hawaii, for the Charging Party.*

## DECISION

### STATEMENT OF THE CASE

JOSEPH GONTRAM, Administrative Law Judge. This case was tried in Honolulu, Hawaii, during the period July 19–29 and October 18–26, 2005. The charges, which were amended several times, were filed by UNITE HERE! Local 5<sup>1</sup> (the Union or the Charging Party) between February 24, 2004 (Case 37–CA–6601–1), and June 15, 2005 (Case 37–CA–6877–1). A consolidated complaint was issued on August 31, 2004. The complaint was amended three times before the hearing, and a fourth amended complaint (the complaint) was orally submitted and granted during the hearing.

At the hearing, the General Counsel submitted an oral motion to amend the caption to substitute “TBR Property, LLC” for “TBR Properties, LLC.” This motion was granted. The Respondents contend that this amendment to the caption denied them due process. This contention is rejected. The first consolidated complaint and the first amended complaint in this case listed “TBR Property, LLC” in the caption. (GC Exhs. 1(kkk) and (mmm).) “TBR Property, LLC” filed an answer to the first amended complaint. (GC Exh. 1(rrr).) The second amended complaint did not list “TBR Property, LLC” in the caption, but instead listed “TBR Properties, LLC” in the caption. (GC Exh. 1(zzz).) However, the correct designation of “TBR Property” remained in the allegations in the complaint. Moreover, “TBR Property, LLC” answered the second amended complaint, and in the caption of its answer substituted its correct name, “TBR Property, LLC” for the typographical error in the caption of the second amended complaint. (GC Exh. (cccc).) The General Counsel’s third amended complaint continued the typographi-

cal error in the caption by listing “TBR Properties, LLC” instead of “TBR Property, LLC.” (GC Exh. 1(eeee).) “TBR Property, LLC” notified the General Counsel that its answer to the second amended complaint satisfied its requirement to answer the third amended complaint. (GC Exh. 1(kkkk).) Of course, “TBR Property, LLC” was not required to answer the complaint if it were not named as a party in the caption. At no time did “TBR Property, LLC” ever alert the General Counsel to the typographical error or indicate confusion from the typographical error. Moreover, “TBR Property, LLC” was consistently and correctly named in the complaints’ allegations. The permission granted to the General Counsel to amend the caption to correct the typographical error has been reconsidered and is affirmed.

The events giving rise to the allegations in the complaint occurred at the Turtle Bay Hotel and Resort in Kahuku, Hawaii, on the island of Oahu. The complaint alleges that Respondent Oaktree Capital Management, LLC (Oaktree) and Respondent TBR Property, LLC (TBR Property) constitute a single-integrated business enterprise and a single employer under the National Labor Relations Act (the Act). The complaint alleges that Oaktree, TBR Property, and Respondent Benchmark Hospitality, Inc. (Benchmark) are a successor to Hilton Hotels Corporation, Inc., which had operated and managed the property from 1998 to 2001 under a contract with Oaktree. The complaint also alleges that Oaktree, TBR Property, and Benchmark are joint employers of the employees at the Turtle Bay Hotel and Resort.

The unfair labor practices alleged in the complaint are that the Respondents (1) violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide requested information to the Union and by preventing the Union on numerous occasions from performing its duties as the exclusive collective-bargaining representative of Turtle Bay’s employees; (2) violated Section 8(a)(1) of the Act by interfering on numerous occasions with Turtle Bay’s employees in the exercise of their rights under Section 7 of the Act; and (3) violated Section 8(a)(1) and (3) of the Act by unlawfully disciplining three employees because of those employees’ protected and concerted activities.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondents, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

Oaktree Capital Management, LLC (Oaktree) acquired ownership and control of Turtle Bay Resort in 2000. This ownership and control is maintained through several intermediate companies, including Turtle Bay Holding, LLC (Turtle Bay Holding), TBR Property, LLC (TBR Property), and Kuilima Resort Company (Kuilima). TBR Property is a wholly owned subsidiary of Kuilima, and it leases the resort property from Kuilima. In turn, TBR Property has contracted with Benchmark Hospitality, Inc. (Benchmark) to manage the resort.

The Turtle Bay Resort is located on a peninsula in Kahuku on the northwestern coast of Oahu. The access road leading to

<sup>1</sup> The General Counsel amended the caption in his posthearing brief and asserted that he was amending the caption to reflect the disaffiliation of UNITE HERE! from the AFL–CIO. The General Counsel should be aware, at this stage of the proceedings, that it is not his prerogative to unilaterally make changes to the caption. A motion should have been filed requesting permission to change the caption and explaining the reasons for the request. Nevertheless, the parties have made no objection to the General Counsel’s change, which, in any event, does not affect the substantial rights of the parties. Accordingly, while disapproving of the rather cavalier manner in which it was done, I have amended the caption of the case.

the resort from the Kamehameha Highway is approximately one-half mile in length and has an attended kiosk close to the highway. The resort consists of a 487-room hotel, cottages, 2 golf courses, riding stables, several restaurants, and accompanying facilities. The resort has approximately 535 employees, including approximately 360 union members.

The General Counsel subpoenaed documents and persons from Oaktree and Benchmark for the hearing. The subpoenaed documents included documents relating to the operation, management, and business of these Respondent companies. In general, the Respondents did not comply with these subpoenas nor did the named persons appear at the hearing pursuant to the subpoenas.

The Respondents acknowledge that the gross revenues of the resort exceeded \$500,000 during 2004. In addition, the resort purchases and receives goods and materials in excess of \$5000, which originate from points outside the State of Hawaii. The Respondents object that the interstate commerce amount was obtained from the unreliable testimony of Timothy Vandever and George Cox, both of whom are employees and union stewards. First, such a less-than-ideal method of proving commerce is acceptable, if not necessary, in cases like the present where the Respondents have refused to produce subpoenaed evidence relating to jurisdiction. See *J.E.L. Painting & Decorating*, 303 NLRB 1029 (1991). Second, Vandever and Cox were credible witnesses notwithstanding their positions as stewards.

Establishing these jurisdictional facts was unnecessarily complicated and prolonged because of the Respondents' refusal to comply with subpoenas and the Respondents' objections to testimony dealing with jurisdictional matters, which the General Counsel was forced to develop because of the Respondents' refusal to comply with the subpoenas. Yet, the size of the resort, its large hotel, and varied activities, including two golf courses that host yearly PGA-sponsored golf tournaments, all on the island State of Hawaii, should give the Respondents pause before raising the issue while the Respondents refuse to comply with subpoenas seeking pertinent, jurisdictional information. By engaging in this conduct, the Respondents tend to obscure what may be serious from insubstantial arguments in the case. Notwithstanding, and without regard to the foregoing, all positions and contentions of both parties are and will be considered to the fullest extent.

The Respondents are engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. JOINT AND SINGLE EMPLOYER

The General Counsel contends that Oaktree and TBR Property are single employers, and Benchmark is a joint employer with Oaktree and TBR Property. As noted above, Oaktree controls and effectively owns Turtle Bay Resort, TBR Property leases the resort, and Benchmark operates the resort under a contract with TBR Property. These relationships and responsibilities may be traced as follows.

Oaktree purchased Turtle Bay in 2000 from a Japanese corporation. (R. Br. 4.) Oaktree then attempted to separate itself from ostensible or direct control of the resort. Oaktree, through three separate funds or accounts, owns Turtle Bay Holding,

LLC (Turtle Bay Holding) and Turtle Bay AJ Plaza, LLC (AJ Plaza). The partnership of Turtle Bay Holding (99 percent) and AJ Plaza Hawaii, Co., Ltd. (1 percent), a wholly owned subsidiary of AJ Plaza, owns Kuilima. Kuilima is the record owner of Turtle Bay Resort. TBR Property is a wholly owned subsidiary of Kuilima, and it leases the resort from Kuilima. TBR Property has entered into a management agreement with Benchmark for Benchmark to manage the resort.

Russell Bernard is a principal of Oaktree and is the portfolio manager for Oaktree's real estate funds. The resort is included within those funds, and Bernard is the asset manager for the Turtle Bay Resort. Bernard is the president of TBR Property and is a member and general partner of Kuilima. Marc Porosoff is the senior vice president, legal, of Oaktree, and he is the vice president and treasurer of TBR Property. Stephanie Schulman is an in-house counsel for Oaktree (she works with Porosoff), and is the vice president and secretary of TBR Property.

Bernard and Porosoff, as the principal and senior vice president of Oaktree, respectively, executed the lease between Kuilima and TBR Property. They signed that lease on behalf of Kuilima, TBR Property, and Oaktree. Bernard and Porosoff, as the principal and senior vice president of Oaktree, respectively, executed the management agreement between TBR Property and Benchmark. They signed this agreement on behalf of TBR Property and Oaktree. Porosoff assisted in negotiating this management agreement.

The management agreement between TBR Property and Benchmark provides that TBR Property remains liable for all operating expenses of Turtle Bay Resort, including all payroll and employee benefits. All revenues Benchmark derives from its management and operation of Turtle Bay Resort is deposited into accounts that TBR Property controls. Bernard and Porosoff are signatories on those accounts. TBR Property and Benchmark participate in labor negotiations at the resort, and Benchmark is prohibited from signing any collective-bargaining agreement without the prior, written approval of TBR Property.

Hy Adelman is a representative of Oaktree, and he maintains an office and residence on the Turtle Bay grounds. He frequently meets with Abid Butt, a vice president of Benchmark and the general manager of the resort, concerning the operation and management of the resort. As Butt testified, this Oaktree representative, Adelman, is "the person responsible for the overall resort." (Tr. 2596.)<sup>2</sup>

Oaktree is required to approve equipment leases for the resort, and Adelman, Oaktree's representative at the resort, handles these matters. In one instance, Adelman authorized and approved an equipment lease signed by TBR Property. Adelman also oversees and approves housekeeping supplies.

Video production companies will occasionally film scenes at the resort. Prior to filming, the resort requires the production companies to obtain insurance protecting Oaktree. In addition, Oaktree executed an employment practices insurance application on behalf of the Turtle Bay Resort. Turtle Bay is required to keep Oaktree informed of the resort's employees and their salaries.

<sup>2</sup> References to the transcript of the hearing are designated as Tr.

The Respondents admit that TBR Property and Benchmark “have control over labor relations or personnel matters at the Hotel at the Turtle Bay Resort.” (Answers of Benchmark, TBR Property, and Oaktree to the second and third amended consolidated complaints.) The management agreement provides that Benchmark is responsible for managing and operating the resort. Benchmark’s vice president of human resources maintains that TBR Property is the employer of the resort’s employees. The TBR Property/Benchmark management agreement provides that TBR Property must authorize and approve any negotiations with a labor union and any proposed collective-bargaining agreement. Benchmark participates in labor negotiations on behalf of Turtle Bay through Burt Cabanas, Benchmark’s chairman and chief executive officer, and Eileen Santoli, Benchmark’s vice president.

The different responsibilities of Oaktree, TBR Property, and Benchmark in labor and personnel matters are more fluid than solid. The vice president of Benchmark maintains that TBR Property is the employer, yet Benchmark is the day-to-day operator and manager of the resort. Moreover, Benchmark, not TBR Property, has issued a “Rules and Regulations” handbook governing conduct by the resort’s employees. Benchmark also has issued a “Staff Handbook—Collective Bargaining Unit Version” governing conduct by, compensation for, and work regulations of the bargaining unit employees. (GC Exhs. 9 and 10.) Moreover, TBR Property seems to be a shell corporation with no purpose other than to provide insulation to Kuilima and Oaktree from TBR Property’s selection of Benchmark as the operator and manager of the resort. As the Respondents state in their brief, “TBR Property, LLC is nothing more than the legal lessor of the property upon which the Turtle Bay Resort is situated. It has no management responsibility whatsoever with respect to daily operations or employment practices.” (R. Br. 175.) The overbearing presence in these relationships is Oaktree, the effective owner of the resort, which must be consulted, either directly or through TBR Property, before any significant decisions are made by or at Turtle Bay Resort, including decisions on labor matters.

The determination of whether two or more entities are sufficiently integrated to be deemed a single employer depends on all of the circumstances of the case. The inquiry focuses on whether the entities’ total relationship reveals (1) some functional interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. *Radio & Television Broadcast Technicians Local 1264 v. Broadcast Service of Mobile*, 380 U.S. 255 (1965); *Parklane Hosiery Co.*, 203 NLRB 597, 612 (1973); *Sakrete of Northern California, Inc.*, 137 NLRB 1220 (1962), *enfd.* 332 F.2d 902 (9th Cir. 1964). Not all of these criteria must be present to establish single-employer status.

(1) *Some functional interrelation of operations.* All of the officers of TBR Property are officers, principals, or employees of Oaktree. There is no evidence that TBR Property has any other employees. There is no evidence that TBR Property has any purpose other than to act as Oaktree’s conduit through which the resort is managed and operated by Benchmark. Every act and right to act by TBR Property is known by and controlled by the ultimate owner of TBR Property—Oaktree. Thus, to the

limited extent that TBR Property engages in any operations, those operations are controlled by and closely interrelated with the operations of Oaktree.

(2) *Centralized control of labor relations.* As noted above, there is no evidence that TBR Property has any officers, managers, or principals other than officers, managers, and principals of Oaktree. As Oaktree’s conduit, TBR Property has the right to control and it does control the labor relations of the resort. Benchmark operates Turtle Bay under a management agreement with TBR Property that was signed by the principal and an officer of Oaktree, and which reserves to TBR Property final approval of any labor negotiations or labor agreement. Accordingly, labor relations are centralized through TBR Property and Oaktree.

(3) and (4) *Common management and ownership and financial control.* Oaktree and TBR Property share management, ownership, and financial control. The principals and officers of Oaktree are the principals and officers of TBR Property. Oaktree owns the owner of Kuilima, which, in turn, owns TBR Property. Kuilima is the record owner of the Turtle Bay property, and the general partner of Kuilima is also the president of TBR Property and a principal of Oaktree. TBR Property leases the resort from Kuilima and has assigned management of the resort to Benchmark. The lease and management agreement were signed on behalf of TBR Property by the principal and an officer of Oaktree. The lease and management agreement were also signed by and on behalf of Oaktree, a circumstance that would be unusual, because Oaktree was not ostensibly a party to those agreements, unless the parties to those agreements recognized that Oaktree was the entity in control of TBR Property, Kuilima, and Turtle Bay.

Oaktree and TBR Property share each of the four criteria to a degree that, in consideration of all the circumstances, they are sufficiently integrated to be deemed a single employer. Moreover, Benchmark and TBR Property admit that they are joint employers of the employees at the resort because they admit to having “control over labor relations or personnel matters at the Hotel at the Turtle Bay Resort.”<sup>3</sup> See *NLRB v. Browning-Ferris Industries of Pennsylvania*, 691 F.2d 1117, 1122–1123 (3d Cir. 1982). Accordingly, the Respondents—Benchmark and TBR Property, together with TBR Property’s single employer, Oaktree—are joint employers of the employees at Turtle Bay Resort.

The Respondents contend that Oaktree is not a joint employer with Benchmark, but this contention is inapposite. The Respondents admit that Benchmark is a joint employer with TBR Property. And, TBR Property’s single-employer status with Oaktree brings Oaktree within the ambit of TBR Property’s joint-employer status with Benchmark.

<sup>3</sup> The Respondents acknowledge other facts that support joint-employer status, such as TBR Property paychecks to employees and Benchmark paychecks to Turtle Bay managers. Also, all employment-related forms contain the names of either or both Turtle Bay Resort and Benchmark. (See R. Br. 178–179.) However, the Respondents’ admission that TBR Property and Benchmark control the labor relations and personnel matters at Turtle Bay is sufficient to establish joint-employer status.



## III. ALLEGED UNFAIR LABOR PRACTICES

*A. Background*

After Oaktree purchased control of the Turtle Bay Resort facilities, it contracted with Hilton to operate and manage the resort. Hilton's operation and management lasted from 1998 to 2001. Since 2001, Benchmark has operated and managed the resort.

Since 1999, the Union has been recognized as and has been designated as the exclusive bargaining representative of Turtle Bay's employees. Hilton entered into a collective-bargaining agreement with the Union that was effective from February 28, 1999, to February 28, 2002. On March 12, 2002, Benchmark and the Union agreed to extend this agreement to May 31, 2002, and continuing thereafter until either party gave the other party 48 hours notice of termination. (GC Exh. 54.) There is no credible evidence that either party provided the 48-hour notice to the other party. Thus, the evidentiary record indicates that the agreement continues in full force and effect. However, the General Counsel has represented that the agreement expired on or about November 25, 2003. The Respondents have not disputed this representation. Accordingly, the General Counsel's representation that the collective-bargaining agreement expired on November 25, 2003, is accepted.<sup>4</sup>

A new contract has not been signed since the extension of the 1999 agreement. In any event, the Respondents continue to comply with at least some of the provisions of the agreement. Nevertheless, the relationship between the Respondents and the Union has soured since the expiration of the collective-bargaining agreement. This deteriorating relationship is exhibited in and has been exacerbated by the unfair labor practices found.

Although the collective-bargaining agreement expired on or about November 25, 2003, the parties do not dispute that the following provision of the agreement, among other provisions, continued in force throughout the period involved in this case (GC Exh. 2, sec. 13):

Authorized representatives of the Union shall be free to visit the hotel at all reasonable hours and shall be permitted to carry on their duties, provided they shall first notify the management or its designated representative, and there shall be no interference with the normal conduct of business.

Throughout the period 2002 to 2005, Marian Marsh, a union business agent who was assigned to Turtle Bay, traveled to the resort about twice a week. She generally went to Turtle Bay on Tuesdays and Thursdays. Occasionally, other union employees and officials would also go to the resort for specific purposes.

<sup>4</sup> Moreover, the complaint defines the bargaining unit as the Respondents' employees who perform work at Turtle Bay, and who are covered under the agreement between Hilton (the Respondents' predecessor) and the Union. The complaint alleges that this agreement was extended through November 25, 2003. (GC Exh. 1(zzz).) The Respondents denied the paragraph only because they objected to the General Counsel's definition of "Respondents." (GC Exhs. 1(bbbb), (cccc), and (dddd).) Accordingly, the Respondents did not deny the definition of the bargaining unit, including the allegation that the agreement was extended through November 25, 2003.

The purposes of Marsh's twice-weekly visits were to meet with the employees, discuss union-related matters, assist employees with any employment problems, meet with management, and process grievances.

During her twice-weekly visits, Marsh followed the practice of walking through the work areas on the ground and lower levels of the hotel as her first order of business. Her purpose was to let the employees know she was there. She then went to the employee cafeteria where she talked to employees. It is not clear if the Respondents dispute whether Marsh was permitted to go through the work areas on the ground and lower levels of the hotel. The Respondents' witnesses differed greatly in attempting to define or describe authorized areas for union representatives. These witnesses, including Nancy Ramos, the director of human resources at Turtle Bay; Thomas Dougher, the chief of security at Turtle Bay; and various security guards, often contradicted each other, and sometimes contradicted themselves. The contradictions in the testimonies from the security guards could be evidence of vague or ambiguous or differing instructions from Dougher, and/or they could be evidence of a lack of trustworthiness of the witnesses. The evidence, the witnesses' demeanor, and the circumstances support the latter conclusion even if Dougher did issue vague or ambiguous instructions.

All facts found in this decision are based on the record as a whole and on my observation of the witnesses. The credibility resolutions have been made from a review of the entire testimonial record and exhibits with due regard for logic and probability, the demeanor of the witnesses, and the teaching of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404 (1962). Many witnesses testified during the two hearing sessions in this case, and it would be unproductive, inefficient, and confusing to address the testimony given by every witness concerning the many factual matters covered in this decision. Nevertheless, it should be noted that as to those witnesses testifying in contradiction of the findings, their testimony has been discredited, either as having been in conflict with the testimony of reliable witnesses or because it was incredible and unworthy of belief or as more fully explained in the text. With respect to the testimony regarding what occurred at meetings or discussions with management or security personnel at the resort, I have also taken into account the economic dependence of employees on employers, with awareness of an employee's attentiveness to intended implications of the employer's statements which might be more readily dismissed by a disinterested party. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

The security officers' varying descriptions of areas where Marsh supposedly was permitted reflects a general intent to limit those areas to an absolute minimum without, however, these security officers having an understanding of the consequences of or reasons for such restrictions. It was as if the security officers had been instructed or had agreed before the hearing to say that Marsh was authorized to be in only one room in the hotel—the employee cafeteria—without regard to the truth of this contention or the previous practice of the parties.

Security officer Ah Sua testified that he believed union representatives were only allowed in the employee cafeteria. (One wonders how the union representatives were supposed to get to

the employee cafeteria.) Sua changed his story on authorized union access several times. Sua also claimed that union representatives had an “all-access pass.” (Tr. 2317.) When asked to explain the meaning of all-access pass, Sua said, implausibly, that such a pass restricted the union representatives to the loading dock and the employee cafeteria. Sua later contradicted this story and “remembered” that two supervisors had told him that union representatives do not have all-access passes. (Tr. 2352.)

Security Officer Anthony Hite, a supervisor, testified that union representatives were allowed in the employee cafeteria. For Hite, union representatives are not allowed in guest areas, which Hite defined as “anywhere other than where the employees are.” (Tr. 2198.) For Hite, guest areas include most of the hotel, including the parking lot. However, at least one of the parking lots is open to the public, but Hite apparently had not considered that anomaly during his attempt to restrict the union representatives’ authorized access.

Romeo Nauta, a supervisory security officer, told security officer Robert Fortin that union representatives are permitted to go into work areas. Dougher testified that an unauthorized area for a union representative is “[a]nything that the guest pays to be in their privacy which is your guest floors.” (Tr. 3670.) However, Dougher changed his testimony by adding that production areas are also unauthorized whenever employees were working in those areas. This incredible qualification would effectively bar a union representative from going anywhere in the hotel, including the employee cafeteria. Moreover, Dougher’s attempt to limit the Union’s authorized access to the resort is contrary to Nauta’s instructions to Fortin, and is not supported by Nancy Ramos, the director of human resources at Turtle Bay, who agrees that union representatives may greet employees at their workstations.

Security guard Rudy Faifili testified that union representatives are not allowed in any areas where guests go. Supervisory Security Guard Gary Nagy testified that union representatives were only allowed to go to the parking lot and the employee cafeteria. Nagy testified that his understanding was based on the collective-bargaining agreement, but he later admitted that he had never read that agreement.

The question of authorized union access at the resort is ultimately resolved by the testimony of Fortin, confirmed at least in part by Dougher and Ramos. More importantly, the determination that union representatives are permitted to go to work areas throughout the hotel is confirmed by the actual practice of the union representatives and the Respondents throughout this period of time. For example, Marsh followed the practice of initially walking through the work areas on the ground and lower levels of the hotel on her twice-weekly visits. And, except for some of the Respondents’ actions detailed below, including the issuance of trespass notices that were allegedly issued for other reasons, as well as surveillance activities by security guards, which were also allegedly done for other reasons, the Respondents did not attempt to stop her.

For all of the foregoing reasons, the evidence demonstrates that union representatives are allowed to be present in the work areas on the ground level and lower level of the hotel, which includes most areas on those levels, including the restaurants, kitchens, lobby, and parking lots. The Respondents have

granted the Union this right of access since the beginning of 2004 or before. Indeed, there is no evidence that the Respondents had ever limited the Union’s right of access prior to the events described in this decision. Marsh usually walked through these work areas when she came to the resort. She would then return to the employee cafeteria on the lower level where she met employees who came there on their breaks and for lunch. The security department, the employee locker rooms, and the human resources department are located near the employee cafeteria.

#### *B. Rules and Regulations Governing Turtle Bay’s Employees*

In approximately January 2002, the Respondents issued a handbook of rules and regulations (rules and regulations). (GC Exh. 9.) These rules and regulations include standards of conduct applicable to Turtle Bay employees. The Respondents deny that they have promulgated or maintained any rules, regulations, or handbooks since approximately May 2004, the date alleged in the complaint. The General Counsel subpoenaed from the Respondents all of its rules and regulations, but the Respondents refused to comply with the subpoena. Ramos admitted that the “Staff Handbook (Collective-Bargaining Unit Version)” (GC Exh. 10) was authentic and was in effect at Turtle Bay. The handbook bears the same logo and format as the rules and regulations. The Respondents presently argue, without citing any authority, that they would be denied due process if they were required to defend the unfair labor practices alleged in the complaint regarding Turtle Bay’s work rules. (R. Br. 218.) The Respondents refused to comply with the Board’s subpoena, and they can hardly complain that the documents already possessed by the General Counsel are not authentic and applicable to the employees at Turtle Bay. Moreover, the Respondents failed to offer any evidence tending to impeach or cast doubt on the rules and regulations that were received in evidence. (GC Exh. 9.) The rules and regulations of the Respondents at Turtle Bay contain the following provisions (GC Exh. 9, p. 2):

1. “No unauthorized social contact will be permitted at any time with guests,” and is misconduct, which could result in disciplinary action, including termination.
2. “Being present on company premises at any time other than the employee’s assigned work shift, unless specifically authorized by his/her supervisor or picking up paycheck,” and is misconduct, which could result in disciplinary action, including termination.

Similarly, the Respondents have issued a “Staff Handbook (Collective Bargaining Unit Version)” (handbook). (GC Exh. 10.) This handbook also contains provisions governing the conduct of Turtle Bay employees. Insofar as the present complaint is concerned, the handbook contains the following provisions (GC Exh. 10, pp. 32, 33, 37–38, 40–41):

1. Page 32. “Under no circumstances should staff members solicit guests, including requests for autographs, soliciting employment and other non-resort matters.”

2. Pages 37–38. “[S]olicitation of any kind of one staffmember by another is prohibited while either person is on working time or in a public or work area.”

3. Page 38. “Distribution by staffmembers of advertising materials, handbills, printed or written literature of any kind in working or public areas of our Resort is prohibited at all times.”

4. Page 33. “Should a staffmember wish to visit the Resort with family or friends, they may do so with the prior approval of their manager and Planning Committee Member. You will be required to have a ‘Return to Property’ pass.”

5. Pages 40–41. “The following are examples of behavior, which violate Turtle Bay Resort policies:”

i. “Presence in the Resort more than 30 minutes before or after your shift.”

ii. “Walking off the job will be considered voluntary termination.”

iii. “Refusing to cooperate during a company investigation.”

*C. The Union’s Presence at the Turtle Bay Resort and Management’s Reactions*

1. February 12, 2004

On February 12, 2004, Marsh and Claire Shimabukuro, a community organizer for the Union, led a rally consisting of union supporters and resort employees. Approximately 50 employees and 25 supporters participated in the demonstration. The purpose of the rally was to demonstrate support for the Union, which was involved in collective-bargaining negotiations with the Respondents, and to protest the failure of the Respondents to sign an agreement. The rally took place on Kawela or Cavella beach, which is on the west side of the resort. The demonstrators carried signs and used two bullhorns, they sang and chanted slogans, and they gave speeches. They remained on the public beach throughout the rally, which lasted approximately 15 minutes, and Marsh and Shimabukuro monitored them to ensure that they remained on the public beach.

The parties acknowledge that the beaches in Hawaii are open to the public. The legal question is how to define a public beach, and the factual question is whether the demonstrators remained on the public beach. Marsh believed that the public beach included the sand portion of the beach, up to the vegetation line. This understanding appears to be consistent with Hawaii law. See *Application of Sanborn*, 562 P.2d 771 (Haw. 1977); *Hawaii County v. Sotomura*, 55 Haw. 176, 517 P.2d 57, 62–63 (1973); *Application of Ashford*, 440 P.2d 76 (Haw. 1968). Marsh testified that she monitored the demonstrators, and they stayed on the sand beach during the rally. Marsh no longer worked for the Union at the time of the hearing; she retired in May 2005. Marsh was a credible witness; she readily and directly answered questions without avoiding the question or volunteering unasked information as is sometimes done by biased or untrustworthy witnesses. Marsh’s testimony regarding the location of the demonstrators was credible.

Dougher testified that Turtle Bay’s property line extended into the beach, and that this extension of its property line into

public property has been certified by the State of Hawaii. (Tr. 3400.) However, the Respondents did not produce a copy of the certification or any other evidence to corroborate Dougher’s statement or Hawaii’s alleged certification. I do not accept that Turtle Bay’s property line extended into an area that under State law is public property without some corroboration of such a claim.

Despite the demonstrators remaining on the public beach, the noise from the demonstration disturbed persons who were part of a wedding party at the resort. The groom and the best man came down from the resort’s pool area where the wedding party was congregating and confronted the group on the beach. The groom and the best man were quite belligerent and threatening. They demanded that the demonstrators leave the beach. They assaulted Marsh and Shimabukuro. They tried to physically pull the sign from Marsh, they wrested the bullhorn from Shimabukuro’s hands, and they threatened to throw Shimabukuro into the ocean.

The resort’s security officers observed these events without intervening. Finally, Thomas Dougher, the chief of security, approached the wedding party members, asked them to return to the pool area, and told them that he would handle the situation. Dougher then had a brief discussion with Marsh. Dougher told Marsh, “This is illegal. You shouldn’t be here. You have to leave.” (Tr. 905–906.) Marsh and Shimabukuro led the group off Kawela beach, with the intention to resume the demonstration on the public beach on the other side of the resort’s property, known as the Bay View Beach.

The group then left the Kawela beach, proceeded along the access road to the parking lot toward the Bay View Beach. However, they were prevented from entering the Bay View Beach because Dougher and other resort security officers blocked the entrance to the beach with several golf carts. As the group approached, Dougher exited his golf cart and told them they could not go to this beach. Another security guard told the group that they needed to get a pass before they could enter that beach. Passes are given at the kiosk at the entrance to the resort.

As noted above, all beaches in Hawaii are public beaches. Because the Respondents control the land over which one must travel to access the beaches surrounding the resort, the resort has dedicated a separate parking lot at its facility for members of the public who wish to use the public beaches. Dougher explained that he instituted a system of distributing passes to members of the public as they entered the resort property in order to keep track of such persons. Accordingly, the demonstrators complied with the security guard’s direction, and they proceeded across the parking lot in order to go down the access road to the kiosk.

However, the security department had summoned Honolulu police officers, and they arrived at this time and stopped the group from going any farther. The police told the group that a paddy wagon was on the way, and if the group did not disburse, everyone in the group would be arrested. The only reason given by the police for their threat to arrest the union supporters was that the resort wanted the group to leave the property. In spite of the actions by the Honolulu police, there is no evidence that the group or any members of the group had done anything illegal. During this entire encounter, neither the police nor the

resort's security guards mentioned the public nature of the beach and its access, nor whether the demonstrators had strayed off the public beach during the rally.

The Respondents now contend that the Union did not secure a permit for the rally. However, there is no evidence that a permit was needed. Moreover, the police did not mention the alleged need for a permit when they threatened to arrest every member of the group.

After being threatened with arrest, the group started to disburse, and many of them proceeded to their cars. Before Marsh could get into her car, Sergeant Lambert of the Honolulu police asked her to wait because the resort was preparing a trespass notice that it wanted to give to Marsh. Marsh told him that the resort could fax the notice to her if it wished. Lambert agreed, and Marsh entered her car. As she attempted to pull out, two security officers in golf carts tried to block her from leaving, but she drove around them.

Thus, by February 2004, the relationship between the Respondents and the Union was marked by confrontation and unpleasantness. The Union resorted to staging a rally to publicize its predicament, viz, the lack of a contract. And the Respondents responded by failing to intervene in a potentially violent situation until the participants in the Union's rally had been assaulted by guests of the resort; by denying demonstrators access to a public beach; by summoning local police to evict the demonstrators; by taking no action against its guests who had assaulted members of the rally; and by physically attempting to prevent Marsh from leaving the resort's property so that security officers could personally deliver a trespass notice to Marsh.

#### 2. February 14, 2004

On February 14, Marsh came to the resort in accordance with her regular duties of meeting with employees twice a week. Marsh's usual routine is to enter the resort at the loading dock, sign a register at the security dispatch office, walk through the ground level and the lower level of the hotel to let employees know she is there, and go to the employee cafeteria to meet with employees.

After Marsh entered the employee cafeteria on February 14, she met with bargaining unit members. As she was engaged in her discussions with the employees, Dougher entered the cafeteria and told Marsh that she was not allowed on the resort's property because she was trespassing and she had already received a verbal trespass notice on February 12. The security department notified the Honolulu police department and requested their presence. After a short period, Marsh complied with Dougher's directive and left. She went to her car in the parking lot with security officers, including Dougher, following her. She told them she intended to go to Leilei's, the restaurant by the golf course. The security officers told her she could not go to Leilei's, a public restaurant, but that she was required to leave the property. Dougher told Marsh, "I'm trespassing your car." (Tr. 745.) The security officers then escorted Marsh down the resort's access road, and out to the highway.

The intent of the Respondents in giving and issuing trespass notices to union representatives was to exclude each such representative from the resort property for a period of 1 year. In

deed, the notices stated that the recipient was not permitted to return to the resort for 1 year. The initial trespass notices stated that the notices were being issued pursuant to section 708–813 of the Hawaii Revised Statutes, a statute titled "Criminal trespass in the first degree," which classifies such an offense as a misdemeanor. Later notices stated that they were being issued pursuant to section 708–814 of the Hawaii Revised Statutes, which is titled "Criminal trespass in the second degree," and classifies such an offense as a petty misdemeanor.

Section 708–814 provides that a person commits the offense of criminal trespass in the second degree if the person unlawfully enters commercial premises within 1 year after a written warning or request to leave by the owner of the premises. The statute also provides that it shall not apply to "any conduct or activity subject to regulation by the National Labor Relations Act." It is curious that this clear exception did not dissuade the Respondents from invoking the statute in connection with the trespass notices issued in this case. The trespass notices issued by the Respondents to the union representatives did not contain or refer to this exemption for conduct regulated by the Act.

These trespass notices constituted the Respondents' attempts to criminalize the Union's otherwise lawful actions while the labor negotiations between the Union and the Respondents were ongoing. The Respondents' antiunion animus, either initiated or exacerbated during the contract negotiations and evident throughout the Respondents' dealings with the Union during 2004 and 2005, degenerated to farce with Dougher's notice to Marsh that he was trespassing her automobile.

#### 3. February 18, 2004

On February 18, Marsh was at the resort in accordance with her duties as a union representative. She came to the resort with Shimabukuro. While Marsh and Shimabukuro were in the employee cafeteria speaking to a unit member, security officer T. Lolotai approached them, said they were being given trespass notices, and told them to leave. Lolotai said that he had been ordered to call the Honolulu police department whenever a union representative came to the resort. Lolotai also said that his orders, which were from Dougher, included a directive to trespass Marsh and Shimabukuro and to escort them off the resort's property. The only reason Lolotai gave for his trespass notice was that Marsh and Shimabukuro had been trespassed on February 12, and they were no longer allowed on the property.<sup>5</sup>

The Respondents claim that Marsh and Shimabukuro failed to sign the register at the security dispatch office when they entered the resort. However, Lolotai did not mention the alleged failure to sign the register when he gave trespass notices

<sup>5</sup> Shimabukuro testified that Lolotai gave several reasons for the trespass notice, including parking in a nonpublic parking space and rallying in nonpublic areas. However, it is apparent that Shimabukuro had confused at least some of the events on February 12, with the events on February 18. Neither Lee nor Lolotai testified. Accordingly, I have relied primarily on Marsh's recollection of February 18 in the above findings, supplemented by a security officer's report of this event. (GC Exh. 47.) Moreover, and as noted above, Marsh presented as a credible and honest witness. She did not "gild the lily" when describing events, as Dougher and several security guards did, and she appeared to attempt to accurately recall events without regard to the positions of the parties.

to the union representatives, and the Respondents do not claim that the alleged failure to sign the register had any bearing on the trespass notices to Marsh and Shimabukuro nor the Respondents' attempt to criminalize their behavior by summoning the Honolulu police department.

Honolulu police officer Dwight Lee arrived shortly after security officer Lolotai issued the trespass notices to Marsh and Shimabukuro. Police officer Lee entered the employee cafeteria. He asked for a representative of management to be present, and Lili Tani, an official in the human resources department, joined the group. Police officer Lee then addressed the group, which included Marsh, Shimabukuro, Lolotai, and other security officers, and Tani. Lee asked if the union representatives had been disruptive, and Lolotai replied no. Lee told them that Marsh and Shimabukuro had a right to be there, that the union representatives' presence at the resort came within the jurisdiction of the National Labor Relations Board (the Board), and that this was not a criminal matter.

Dougher acknowledges being told of Lee's statements. Dougher also acknowledges that he was not clear whether issuing trespass notices to the union representatives was proper, and he admits having many discussions about this issue. Nevertheless, he and his security officers, pursuant to his instructions, continued to issue numerous trespass notices to union representatives.

#### 4. March 25, 2004

On March 25, approximately 50 people gathered outside the resort's grounds, along the Kamehameha Highway, for the purpose of attending a rally in support of Turtle Bay's employees. Most of these people were union members from other locations, although several resort employees were members of the group. The purpose of the demonstration was to express support for the employees and the employees' efforts to obtain a contract, and to protest the failure of the Respondents to sign a contract. Marsh did not participate in the rally. The Respondents had received advance notice of the rally, and security guards were posted at the entrance of the resort when the group gathered across Kamehameha Highway from Turtle Bay. The group then walked into the resort.

While the group was gathering in front of and entering Turtle Bay, two security guards were seated in golf carts at the entrance to the resort. The guards were holding video cameras that they pointed toward the group, appearing to videotape the group as they gathered and went into the resort. There had been no violence or confrontations of any kind among the demonstrators.

When the group entered the resort's property, the security officers gave them hand-drawn maps of the resort. The group walked down the access road and met with a group of approximately 20 resort employees in the parking lot. This group then split, with the employees going to the left and down the access road to the Kawela Bay Beach, and the other group marching to the hotel's entrance while chanting and carrying signs and one large banner.

The second group continued its chanting as it proceeded into and through the lobby of the hotel. They also continued to carry signs and the large banner, which was being held by several

people. The Respondents had called the Honolulu police department, and there was a police officer present in the hotel's lobby when the group entered. There were approximately four security guards in the lobby, including Dougher. The group marched through the lobby without coming in contact with any guests or employees. However, the security guards tried to stop the demonstrators by placing themselves in front of the demonstrators and blocking their passage. Dougher claims two or three members of the group hit him as they were going through the lobby. He claims that one person shoved him, another hit him in the face with a camera, and another kicked him in the shin. Dougher claims that he did nothing to the perpetrators in response to these assaults. Dougher was not a credible witness, and his testimony about being assaulted or struck by members of the rally, except perhaps for incidental and inconsequential contacts, is not credited.

Dougher has been a director or assistant director of security departments for various hotels since at least 1987. He was the director of security and safety at Turtle Bay from 1988 to 1996. He was the director of security for the Hilton Waikaloa from 1996 to 2001, and he returned to the same position at Turtle Bay in August 2001. Dougher oversees a department that has 24 security officers, including 4 supervisors. Dougher is an authoritative man, and he appears to be accustomed to giving orders. He does not appear to be a man who would meekly or silently suffer a series of kicks, shoves, and hits. For this reason alone, which is based primarily on Dougher's demeanor, his testimony regarding the rally's march through the hotel lobby is not credible. However, there are additional reasons to discredit Dougher's testimony.

Security guard Nagy was with Dougher on March 25 when the rally members came through the lobby. He did not see anyone come in contact with Dougher. He did not see any physical contacts between the rally members and any other person in the lobby. Nagy stated that the banner being carried by some of the rally members came into contact with him. Of course, this is not surprising since he placed himself in front of the banner in order to stop the rally. However, he then moved out of the way to let them pass. In addition, a Honolulu police officer was present in the lobby when the rally went through, and the police officer took no action regarding any alleged assault or physical contact.

Dougher testified at the hearing that he did not know the person who had kicked him in the shin on March 25. However, in an affidavit he gave before the hearing, Dougher identified that person. Dougher testified at the hearing that he had instructed security officer Michael Carter to videotape union officials, and that he had instructed Thomas Parks, the resort's director of sales, to videotape union representatives and employees who were participating in a demonstration on the Kamehameha Highway in front of the resort. Moreover, Dougher admitted at the hearing that he knew of at least one instance in which a union representative's picture was taken. However, in an affidavit he signed before the hearing, Dougher said he was unaware of anyone videotaping or taking pictures of any union representatives.

Dougher testified at the hearing to an alleged encounter with Marsh on January 27, 2005. Dougher claims that Marsh was

seated on a couch in the lobby, and he told her that she should not talk to employees in the lobby because the hotel was particularly busy that day. He claims that Marsh told him to go away and mind his own business, and that he did nothing in response. He then followed Marsh as she proceeded to the elevators and insisted she use another set of elevators, which was difficult for Marsh because she was suffering from a bad back. Dougher claims that Marsh did not tell him anything about being in physical discomfort. However, in an affidavit he signed before the hearing, Dougher said that Marsh did tell him about her bad back. Dougher's treatment of Marsh when she was in physical pain shows the pettiness to which the employer's antiunion attitude devolved. Dougher's denial of any knowledge of Marsh's physical pain in his testimony, which is contrary to the testimony he gave in his sworn affidavit, is further evidence of his lack of credibility.

Dougher testified that on other occasions union representatives cursed at him and belittled him, but that he did not react to such provocations. For example, Dougher claims that shortly after he arrived at the resort in September 2001, he noticed Eric Gill, the secretary-treasurer of the Union, and Marsh talking with employees and stopping those employees from working. This was the first time he met Gill and Marsh at Turtle Bay. He said to Gill and Marsh that they should not be doing this, and Gill told Dougher that he (Gill) could go anywhere he pleased and do anything he wanted. Gill told Dougher to call the police if Dougher wanted Gill off the property. Marsh was also rude by telling Dougher, "Why don't you just go do something else." Dougher remained calm and simply responded to Gill, "It does not have to be that way Eric." (Tr. 3368-3370.)

This alleged encounter is implausible and incredible. Marsh did not appear to be a person who would be rude, much less rude with no provocation or reason. Moreover, this event was supposedly the first time Marsh had met Dougher, increasing the implausibility of Dougher's testimony. Dougher's testimony regarding his initial encounter with Gill and Marsh at Turtle Bay is also rejected because his demeanor, noted above, shows a person who would not meekly and silently accept such rudeness, as Dougher claims he did in response to the alleged rudeness of Marsh and Gill.

Dougher related other instances of Marsh's alleged rudeness and crudeness. For example, on February 14, Dougher told Marsh she could be trespassed for parking her car in the bus area. Dougher claims that Marsh replied, "I'm leaving; screw you." (Tr. 3452.) Dougher claims he said and did nothing in response. On June 11, 2004, Dougher claims that he saw Marsh in the hotel's kitchen, and he told her to leave. He claims that Marsh replied, "God damn you. I'll do what I please and I'll go where I please." Again, Dougher claims he said and did nothing in response to this outburst. (Tr. 3529.) Like the other examples cited herein, and considering the demeanor of Marsh and Dougher, the foregoing testimony of Dougher is not credible, both because Marsh's demeanor was not consistent with such alleged rudeness and because Dougher's demeanor was not consistent with such meekness.

Another example is Dougher's alleged encounter with Daniel Kerwin, a union representative, in April 2003. Dougher saw Kerwin walking to the bar in the pool area, and Dougher fol-

lowed him. Kerwin allegedly took out a camera and appeared to be taking pictures. Dougher approached Kerwin. Kerwin then supposedly pushed and shoved Dougher, and told Dougher that he could not bother Kerwin. Dougher elaborated on this alleged incident as follows (Tr. 3376):

He [Kerwin] went right into my face and he told me, "Go ahead. Hit me. And I'll call the cops and I'll sue your ass. And if you think I'm screwing with you, go ahead and hit me." And he kept coming into me. I didn't move and he kept coming into me. At that point, he's in my property. And I didn't say anything more.

Kerwin is allegedly on Dougher's "property;" he is threatening Dougher; he is in Dougher's "face;" Dougher is the director of the security department and is a forceful individual; yet Dougher did and said nothing. At best, this story is implausible and incredible. Yet, Dougher recounted it with the same authoritative and confident tone he imparted to all his testimony, including his testimony that contradicted his previous sworn statements. In the end, one could not separate fact from fiction in much of Dougher's testimony.

Returning to the March 25 rally, the demonstrators went through the lobby to the pool, which leads to the Kawela Beach. They went directly to the beach and met with the group of employees who had split from the group in the parking lot. There were 20-25 people in each group, so the number of demonstrators on the beach numbered approximately 40-50 people. The people chanted, and they were led by at least two persons with bullhorns. The people remained on the sandy portion of the beach throughout the rally. The demonstrators did not engage in any violence throughout the rally.

During the demonstration on the beach, Dougher, who was stationed on the resort's property above the beach, held a video camera that he pointed at the demonstrators, as if he were videotaping them. The demonstration on the beach lasted for approximately 40 minutes.

Because of the rally on March 25, the Respondents decided to follow or "shadow" (Tr. 2653) union representatives when they came onto the resort. In addition, the Respondents incurred the expense of continually having at least one security guard assigned to follow union representatives even if union representatives were not present. Until the union representative appeared, the assigned security guard was considered to be "floating." (Tr. 2311.)

The assigned security officers closely followed the union representatives, often within several feet. The security officers who were assigned to follow the union representatives carried notebooks or logs on which they made notes of what the union representatives were doing, including meetings with employees. Dougher told Nagy, a supervisory security officer, that the reason for such monitoring was the violence and dirty tactics used by the union on March 25.

Other security guards gave different reasons to explain why the resort closely followed union representatives whenever they came onto the property. Nagy said that the monitoring was done to protect the guests and employees from any further incidents. (Tr. 3191.) Nagy failed to explain how shadowing union representatives would prevent another rally. Indeed, further

rallies took place on the resort property. Leeann Duque, the assistant director of security at Turtle Bay, stated that monitoring was done because the union representatives continued to go into areas that were considered work areas and areas that were unauthorized. (Tr. 2989.) Without regard to the fact that union representatives are permitted to go into work areas, Duque failed to explain why union representatives were shadowed in areas where everyone, even Duque, agrees they were allowed to go, such as the parking lot and the employee cafeteria. Moreover, Duque's explanation fails to explain why the Respondents did not prevent the union representatives from going into unauthorized areas rather than following the union representatives wherever they went in the resort.

Neither the union nor the demonstrators engaged in any violence on March 25. The Respondents' reaction to the rally—to shadow union representatives whenever they came onto the property—was neither effective nor focused nor reasonable. It was retaliatory and was designed to intimidate and provoke the Union, while interfering with the Union's ability to perform its representation functions at Turtle Bay.

#### 5. April 2, 2004

On April 2, approximately 20 persons, most of whom were employees of the resort, gathered at the entrance to the resort for a rally. The purpose of the rally was to express the employees' frustrations at the failure to secure a contract. The rally was across Kamehameha Highway in front of the resort. The rally members chanted, and they held signs. The signs contained no threats and the rally was peaceful.

Dougher was seated in his personal vehicle, which was parked at the entrance gate, across the highway from the rally. Dougher held a video camera, which he pointed toward the rally and the participants in the rally, as if he were videotaping them. The members of the rally could see Dougher, and they believed he was videotaping them. Other security guards were observing the rally, and they were seated in golf carts at the entrance to the resort.

#### 6. April 17, 2004

On April 17, approximately 80 people, about half of whom were employees of the resort, participated in a rally at the resort. The purpose of the rally was, again, to express the participants' frustrations at the failure to secure a contract. The demonstrators met in the parking lot, and as they were gathering there, a security guard, identified as Val, took pictures of the license plates on each of their vehicles.

The rally proceeded onto the beach where the participants held their signs and chanted for approximately 40 minutes. There was no violence, or threats of violence, or confrontations during the rally. While the rally was taking place on the beach, a security guard, identified as Michael, was pointing a video camera at the group as if he were videotaping the rally. In addition, Tom Parks, a sales manager for the resort, held a video camera and pointed it at the group as if he were videotaping them.

George Cox, a maintenance employee at the resort for 23 years, testified to the facts regarding this videotaping, as well as his conclusion that the participants were, in fact, being videotaped. Counsel objected to the latter testimony on the ground

the witness was speculating. The objection was overruled, with the proviso that the witness should explain the basis for his conclusion. This ruling has been reconsidered and is affirmed. Cox's testimony that videotaping was taking place, while a conclusion, nevertheless reveals the witness's perception of what was occurring. Moreover, and without regard to the witness's conclusion, whether videotaping was actually taking place need not be resolved in deciding the question of whether the Respondents' actions constitute a violation of Section 8(a)(1) of the Act because the Respondents' actions would be equally violative if they unlawfully surveilled or created the impression of such surveillance.

#### 7. May 4, 2004

On May 4, Marsh was at the resort in accordance with her regular duties as a union representative. Shimabukuro, who was accompanied by other union agents, also came to the resort that day with a group of approximately 50 union retirees. She escorted the retiree group to the Palm Terrace restaurant, one of the restaurants at Turtle Bay resort. The retirees came in a bus, and Shimabukuro came separately in her car. The purpose of this visit by the retirees was to show support for the resort's employees during the ongoing contract negotiations.

The restaurant is divided into three tiers. When the retirees entered, there were about 10 patrons of the restaurant seated in the upper tier. The retirees were seated in the lowest tier. They ordered coffee or tea and had discussions at separate tables. Marsh had coffee with the group, and she helped some members of the group find the restroom and the way back to the bus. The retirees remained in the restaurant for about an hour. As they were preparing to leave, Shimabukuro briefly addressed them and thanked them for showing their support for Turtle Bay's workers. The retirees responded by applauding. The retirees left through the lobby, and they chanted as they went. They then boarded the bus and departed.

As Shimabukuro was gathering her papers on the sidewalk in front of the hotel lobby, two security guards approached her. They told her they were going to issue trespass notices to her and to Marsh. The guards escorted Shimabukuro to the employee cafeteria where Marsh was located. Marsh was conversing with several employees on employment matters. Dougher then arrived with two Honolulu police officers. The police officers told Marsh and Shimabukuro that they had to leave because they were trespassing. Security guard Nagy then handed trespass notices to Marsh and Shimabukuro.

The trespass notices advised Marsh and Shimabukuro that they were not permitted to return to the resort for a period of one year, and if they did return during this period, they would be subject to criminal prosecution. These trespass notices refer to the resort as Hilton Turtle Bay, the resort's previous name. This misnomer was corrected in later trespass notices issued to the union representatives. Later, in approximately June, Dougher supplemented the warning on the trespass notice by telling Marsh she was banned from the resort for 1 year. After the trespass notices were delivered, a security guard took pictures of Marsh and Shimabukuro. They were then escorted by security guards from the employee cafeteria, and out to the parking lot.

The security guards escorted Marsh and Shimabukuro to their cars in the parking lot. The guards then took pictures of the license plate of both Marsh's car and Shimabukuro's car.

#### 8. May 6 and 24, 2004

The collective-bargaining agreement between the Respondents and the Union requires the employer to deduct monthly union dues from employees' wages upon receipt of a written authorization. After the agreement expired, and despite the Respondents' continued compliance with other provisions of the agreement, the Respondents no longer deducted monthly dues from employees' wages.

On May 6, during a telephone conversation, Ramos told Marsh that the Union was not permitted to collect its dues on the resort's grounds because Ramos considered union dues collection to constitute solicitation, and the Respondents had a "no solicitation" policy. Ramos confirmed her statement in a letter to Marsh, which stated, "Please be advised that we will not be allowing Business Agents or Local 5 staffing on property to solicit union dues from our employees." (GC Exh. 3A.)

Despite Ramos's reference to an alleged no-solicitation rule as the reason the Union was being prohibited from collecting dues, the Respondents now claim Ramos really meant that the union's collection of dues constituted harassment to employees. Therefore, the Respondents claim that Ramos was actually prohibiting the union's collection of dues because employees were being harassed by such collections, not because of a no-solicitation rule. The Respondents further claim that "TBR's restrictions did not prevent dues collection; rather it was the manner of solicitation of dues to which Ramos objected." (R. Br. 212.) Ramos's letter to the Union highlights the speciousness of this assertion. Ramos's entire letter to Marsh states as follows (GC Exh. 3(a)):

Please be advised that we will not be allowing Business Agents or Local 5 staffing on property to solicit union dues from our employees.

Thank you for your understanding. If you have any questions, please feel free to call me.

Ramos repeated and stressed this unambiguous directive in another letter to Marsh dated October 26, 2004. That letter states (GC Exh. 3(c)):

We have been advised that you will be on property on October 26th to collect Union dues from our employees in the cafeteria.

Please be advised that our position on this matter has not changed. We will not allow union dues to be collected on resort property. Also please note that I personally advised you that you would not be allowed on property to collect dues when we met on October 21, 2004. Your response to me during this time was "oh well I'll be on the road". Just so that there is no misunderstanding about this issue, our position is that there will be noo [sic] dues collecting on property.

Thank you for your understanding.

There is no reference in the letters to the manner of dues collection. The prohibition of dues collection is presented as a fait accompli. The language of the letters is consistent with

Ramos's statements to Marsh, and is consistent with later statements by Dougher and security guards when they prevented the Union from collecting dues at Turtle Bay.

Moreover, there is no evidence that the Union's collection of dues at Turtle Bay interfered with the resort's normal conduct of business. The dues were collected, or were attempted to be collected, in the employee cafeteria, which was open to employees who were on breaks or were otherwise in a nonworking status. There was testimony that George Lagua, who worked in the kitchen, may have left his station to pay dues to Marsh in the cafeteria. However, there was no credible evidence that Lagua was not on his break when he paid his dues. Also, even if Lagua was not on a break, there was no evidence that Marsh had requested Lagua to pay his dues other than when he was on a break.

In addition, the Respondents did not enforce a no-solicitation policy against other companies, organizations, or causes. For example, in 2005, Costco was permitted to solicit, for membership, the resort's employees in the cafeteria. Indeed, fundraising was a common practice at the resort. The Respondents offered no evidence of any time, other than against the Union's collection of dues, that this alleged no-solicitation rule was enforced.

On May 24, Jessie Cueva-Decoite, a senior dues clerk for the Union, and Clarence Baijo, a business representative for the Union, went to Turtle Bay to collect union dues. They went to the employee cafeteria carrying their cash box and sat at a table in the rear of the cafeteria. There were several employees in the cafeteria. A few minutes after they arrived, Dougher and another security guard came into the cafeteria. Dougher showed Decoite and Baijo a copy of Ramos's letter and told them they were not permitted to collect dues. Dougher told Decoite and Baijo to follow him. After having a discussion with Ramos, Dougher took them to his office. Dougher told them that they were trespassing. Baijo said that they had a right to be there to collect dues. Dougher then called the Honolulu police.

Two Honolulu police officers arrived. They requested personal identification from Decoite and Baijo, and they told Decoite and Baijo a background check would be done on them. The police officers left Dougher's office with the identifications, returned 15–20 minutes later, told Decoite and Baijo that they were "clean," and said the police officers were going to call their sergeant because they did not know what to do. The sergeant arrived about 15–20 minutes later, and spoke privately with Dougher. Dougher returned to his office, and told Decoite and Baijo that if they left the resort's grounds he would not issue a trespass notice to them. Nevertheless, the police officers advised Decoite and Baijo that the police department would keep a record of this matter and their actions. This report was called a "miscellaneous public," and a notice was handed to Decoite and Baijo to confirm the existence of this miscellaneous public report. Decoite and Baijo then left the resort. However, after leaving the resort, they parked on the side of the road and were able to collect some dues from workers as the workers left at the end of the day.

#### 9. June 2 and 7, 2004

On June 2, Marsh went to Turtle Bay with Baijo and Joel Muricami, who is a paralegal with the Union's legal depart-



ment. They went to the employee cafeteria and talked to employees about the ongoing contract negotiations with Turtle Bay. As they were talking to employees, a Honolulu police officer came into the cafeteria accompanied by Henry Lacar, the property operations manager at the resort. The police officer said that he needed to fill out some forms, which were in his vehicle, regarding this occurrence, and he asked Marsh to accompany him to his vehicle. Marsh declined, preferring to remain with Baijo and Muricami as witnesses. The police officer left for the ostensible purpose of completing forms. However, he never returned, and a trespass notice was not issued on that day to Marsh or the other union employees.

On June 7, Marsh was in the employee cafeteria, together with employees of the resort, pursuant to her duties as a union representative. Dougher, Nagy, and Honolulu police officers approached her. Nagy handed Marsh a trespass notice and told her the notice was on a revised form and was intended to replace the trespass notice that was issued to her on May 4. (GC Exh. 36B.) The trespass notice contains the following language:

[Y]ou are hereby advised that your presence is no longer desired on Turtle Bay Resort ("TBR") premises and that you are not to return to said premises for purposes of union dues collection or solicitation or for any activities that are disruptive or interfere with the normal conduct of TBR's business, for a period of one (1) year, effective as of the date indicated above.

This includes the entire grounds and premises of TBR

....

If you violate this Trespass Warning, you will be subject to arrest for the offense of Criminal Trespass in the Second Degree, Haw. Rev. Stat. § 708-814, which is a Petty Misdemeanor.

The Respondents' form also contains spaces for individual physical characteristics of the person to whom the trespass notice is given, under the heading "description of suspect."

All subsequent trespass notices from the Respondents to union representatives used this new form. Dougher told her that the police officer was present to witness her receipt of the trespass notice and to send it to the prosecutor's office. Dougher told Marsh that she was not going to be arrested at that time. The police officer told Marsh that he was going to send the trespass notice to the prosecutor's office. Marsh had not disrupted any employees or interfered with the work of any employees on June 7.

#### 10. June 11, 2004

On June 11, Marsh arrived at the resort at approximately 6:15 to 6:30 in the morning. She walked through the lobby, the Palm Terrace Restaurant and its kitchen, and then down to the employee cafeteria. June 11 is a State holiday in Hawaii in honor of King Kamehameha. Ramos was in the cafeteria when Marsh arrived and was serving coffee and pastries to the employees. Ramos told Marsh that Ramos was having a private function for the employees, and she asked Marsh to leave until 8 a.m.

After Marsh returned to the cafeteria, Dougher, Nagy, and a Honolulu police officer entered the cafeteria and approached her. Nagy handed Marsh a trespass notice that had been pre-

pared by Dougher and told Marsh that she was being issued the trespass notice because she had arrived too early that day. Dougher had told Nagy that Marsh was being issued the trespass notice because she was at the hotel at an improper time. In addition, the Respondents agree that they issued the trespass notice to Marsh based on the time she came to the resort. (R. Br. 92.) The trespass notice, which was on a form similar to the trespass notice issued to Marsh on June 7, contains an additional page, which states, among other things, that the trespass notice "will be filed with the prosecuting attorney's offices immediately." (GC Exh. 36C.)

Dougher's "improper time" allegation or charge was based on his belief that union representatives could only be at the resort during the time the resort's personnel office was open. He did not consult with Ramos or other management personnel in forming his belief or before issuing the trespass notice to Marsh. Ramos asserted that her office was open between 7 and 6 p.m. However, Ramos believes that union representatives may properly be at the resort during those hours, or when she is at the resort, which was the case on June 11.

Security guard Clayson Hanohano was assigned to and did follow Marsh everywhere she went in the resort. June 11 is the first time Marsh noticed that she was being followed throughout the resort. Hanohano remained 2-3 feet behind Marsh wherever she went, including the employee cafeteria. When she went to the ladies' room, he stood outside the ladies' room until Marsh came out.

Shadowing is an accurate description of what the security guards were assigned to do and did as they followed union representatives throughout Turtle Bay. For example, shadowing conveys a sense of the close proximity between the security guard and the union representative, which was often within several feet, when the guards followed union representatives. Moreover, at least two witnesses used "shadowing" to describe what the security guards were doing: Marsh (Tr. 789) and Ah Sue, a security guard. (Tr. 2653, 2669.)

There is no apparent reason why the Respondents' security guards would follow Marsh or other union representatives throughout the resort, including the parking lot and the employee cafeteria. The security guards offered conflicting reasons at the hearing for following the union representatives throughout the resort, including protecting the facility, protecting the employees, and protecting the union representatives. None of these alleged reasons withstands analysis or is supported by the circumstances. In addition, and other than the security guards' testimony at the hearing, the Respondents never explained these alleged reasons to the union representatives. Moreover, it is uncertain whether the security guards, other than Dougher, knew the reason why they were ordered to shadow the union representatives.

#### 11. June 12, 15, 17, and 22, 2004

On June 12, Marsh was in the employee cafeteria conversing with employees pursuant to her duties as a union representative. At approximately 11 a.m., Nagy approached and handed her another trespass notice. Nagy was accompanied by a Honolulu police officer. Marsh asked why this trespass notice was being issued, but Nagy replied only that he was following orders.

Marsh remained in the cafeteria conversing with employees until approximately 2 p.m.

On June 15, Marsh was in the employee cafeteria conversing with employees pursuant to her duties as a union representative. At approximately 7:30 a.m., Nagy entered the cafeteria with members of the Honolulu police department. He handed another trespass notice to Marsh. Nagy did not tell Marsh why the trespass notice had been issued to her.

On June 17, Marsh was in the employee cafeteria conversing with employees pursuant to her duties as a union representative. At approximately 11:30 a.m., Nagy entered the cafeteria with members of the Honolulu police department and handed a trespass notice to Marsh. Nagy did not tell Marsh why the trespass notice had been issued to her. Nagy told Marsh that the resort was going to send the trespass notice to the prosecutor's office, and he said this loudly enough for the employees in the cafeteria to hear.

On June 22, Shimabukuro was at Turtle Bay to collect union dues. She went to the employee cafeteria and sat at a table in the rear of the cafeteria. She placed her cash box and receipt book on the table. Employees came to her table to pay their dues, and as she was collecting, Nagy entered and told her she could not collect dues on the resort's property. A little later, Dougher entered and told her that she could not collect dues on the property. About 20 to 30 minutes later, a Honolulu police officer arrived and told Shimabukuro that she was trespassing, and she must leave the premises. Shimabukuro asked the police officer if she would be arrested if she did not leave, and he said yes. Nagy then handed a trespass notice to Shimabukuro, which was witnessed by the police officer. This encounter between security guards, the police, and Shimabukuro occurred in the presence of employees.

The Respondents cite handwriting on the trespass notice for its contention that the notice was issued to "supersede[ ] [the] trespass warning issued [to Shimabukuro] on 5-4-04." (GC Exh. 37B.) However, this contention ignores Dougher and Nagy's statements to Shimabukuro regarding her collection of dues before the trespass notice was issued. Assuming that one of the purposes of the notice was to supersede a prior notice, the circumstances demonstrate that Shimabukuro's collection of dues was also a cause for the issuance of the trespass notice.

Every time the Respondents issued and handed a trespass notice to a union representative, the Respondents summoned the Honolulu police department and obtained the assistance of police officers to evict the union representatives or to serve as witnesses. Indeed, on one occasion, a Honolulu police officer came to the resort to serve as a witness, but Marsh had already departed before the police officer arrived. It is somewhat surprising and confusing that the Honolulu police department would allow its officers to serve in this capacity. It appears that the Honolulu police officers were acting as part of Turtle Bay's security department, because the resort's security guards could also have served as witnesses. However, every time the Honolulu police officers came to the resort, they wore their police uniforms, so it is unlikely they were actually serving as part of the resort's security department. Rather, the police officers were acting in their official capacity as police officers, with all

of the attendant force and power, as well as intimidation, which accompany their status.

On at least one occasion in June, Dougher told Marsh that she was banned from Turtle Bay for a year because she was a "disruptive force." (Tr. 797.)

12. August 6, 2004

Nate Santa Maria was a representative for the Union from March to December 2002 and May to October 2004. During the latter period, Turtle Bay came under his responsibility. He visited the property approximately two to three times a month.

On August 6, Santa Maria visited the property. He arrived at approximately 4 p.m. He had three reasons for his visit: one, he was relatively new to the Turtle Bay team and he wanted to introduce himself to the employees; two, he wanted to answer any questions the employees might have; and three, he wanted to remind employees that Marsh would be on Kamehameha Highway outside the resort on August 10 to collect dues. (As explained above, Turtle Bay had stopped withholding union dues from employees' paychecks and had barred the Union from collecting dues on the resort property.) Santa Maria came to the resort around 4 p.m., and he went initially to the employee cafeteria. He spoke to about 10-15 people in the cafeteria. He then went to the kitchen next to the cafeteria and spoke to the kitchen workers. At this time, he noticed that a security guard, Romeo Nauta, was following him. Nauta stayed within 5 to 7 feet of Santa Maria.

Santa Maria spoke separately and briefly with the employees in the kitchen about the three matters he wanted to cover. He walked to the stations of the workers and spent approximately 15-20 seconds with each worker. As Santa Maria and Nauta were exiting the kitchen, Nauta told Santa Maria that he was disturbing the workers and he should not talk to them. Santa Maria disputed that he was disturbing the workers, and he proposed to Nauta that they ask the workers. This was not done, and Nauta continued to follow Santa Maria closely to the elevators. Santa Maria admits that he was becoming annoyed at Nauta, and he asked Nauta why he was "being such an asshole." They then took the elevator to the upstairs kitchen.

After they exited the elevator in the upstairs kitchen, Santa Maria approached the kitchen workers and briefly spoke to them, just as he had done in the downstairs kitchen. Nauta continued to follow Santa Maria within 5 to 7 feet, and he again told Santa Maria to keep moving because he was disturbing the workers. Santa Maria and Nauta exited the kitchen, and Santa Maria spoke to employees in the restaurant and the pool area in the same manner as he had done in the kitchens. They walked back to the kitchen and Nauta asked Santa Maria where he was going. Santa Maria replied he was going to the front desk area to talk to the workers there. Nauta stopped him and told Santa Maria that he could not go there. Nauta then made a telephone call.

Within 5 minutes, Ramos and Dougher, together with two managers and additional security guards, arrived. They surrounded Santa Maria, with one security guard standing by the elevator. Ramos asked Santa Maria what he was doing, and he told her. She said he was disturbing the workers, and the Union did not have the right to talk to the workers at their worksta-

tions. Ramos agreed that the union representative could be at the workers' stations, but could only say hello and nothing more. Santa Maria asked if he could reply to a worker who might have a question, and she said no. She said anything more than "hello" needed to take place in the cafeteria.

Dougher accused Santa Maria of disturbing the workers. Santa Maria asked Dougher to identify any such worker, but Dougher did not reply. Dougher told Santa Maria he could not talk to the workers in the front lobby area, and he was required to leave the hotel. Santa Maria refused to leave, saying the contract gave him the right to talk to the workers. At this impasse, the parties remained standing in the kitchen for approximately 45 minutes, with Santa Maria surrounded by four security guards, including Dougher, together with Ramos.

Then, three Honolulu police officers arrived. They spoke with Ramos, Dougher, and Santa Maria. Santa Maria told the police officer that he wanted to leave because it was getting late, but he would only leave through the front lobby. The police officers discussed this condition with management, and they agreed. Santa Maria then left, escorted by and followed by the police officers and security guards. They exited the kitchen and went through the restaurant and the lobby to the parking lot.

The confrontation in the kitchen involving the security guards, management, the police officers, and Santa Maria occurred in front of the employees who were working there, as well as employees, such as waitresses, who entered the kitchen during that time. The security guards followed Santa Maria to his car. He departed at approximately 6:45 p.m.

Fred Scalzo has been a sous chef at Turtle Bay for 6 years. During that time, he has spoken to Marsh and told her to leave the kitchen approximately 30 times for talking to kitchen workers. On August 6, he claims to have seen Santa Maria in the downstairs (or main) kitchen talking to workers in the pantry area and disturbing their work. He asked Santa Maria to leave, and Santa Maria went to the service elevator that connects with the Palm Terrace Restaurant kitchen. Scalzo called the security department. Nauta appeared and began following Santa Maria, starting at the elevator. Scalzo claims that Santa Maria started arguing with Nauta at the elevator and refused to follow Nauta's instructions to go upstairs.

Scalzo was not a credible witness. The many times he admits having previously told Marsh to leave the kitchen because she was supposedly disturbing workers lessens the seriousness, if not the truth, of his claim that Santa Maria was actually disturbing the workers. Moreover, Scalzo admits that after he told Santa Maria to leave, Santa Maria went to the elevator to go to the upstairs kitchen. He claims that he only calls security if a union representative refuses to leave. Nevertheless, he called security despite Santa Maria following Scalzo's order to leave. Scalzo did not explain why he called the security department in these circumstances. Scalzo appears to have developed an anti-union animus as evidenced by, or from, his many complaints about union representatives' activities. And his call to the security department before or after Santa Maria was obeying his order to leave questions the veracity of his claim that he only calls security when the union representative refuses to leave.

Scalzo claims that Santa Maria argued with Nauta at the elevator and refused Nauta's order to go upstairs. Although Santa Maria and Nauta argued at the elevator, it is not plausible that Santa Maria refused Nauta's order to go upstairs. Santa Maria was trying to see as many workers as possible to cover the three things on his agenda. He had arrived at the resort at 4 p.m., and he had additional appointments in the early evening. Although Santa Maria was annoyed at being followed, and being followed so closely by Nauta, he would not likely have refused an order to go upstairs, which is where he wanted and needed to go, and where he did go, to talk to the other workers.

Sonia Evans is the purchasing manager at Turtle Bay. She testified that Santa Maria yelled, "f— you," to Nauta in the presence of Scalzo and herself in the main kitchen. Scalzo did not confirm this alleged statement by Santa Maria. Given Scalzo's attitude toward union representatives, and considering the nature of the alleged statement, it is not likely that Scalzo would have failed to confirm the statement if it had actually been made. Santa Maria did not admit making the statement, and Nauta did not testify. Accordingly, the credible evidence does not establish that Santa Maria yelled this expletive at Nauta.

Evans' credibility suffers further from her tendency to at least exaggerate events that did happen or might have happened. For example, she claims that Santa Maria was "grilling" the employees in the kitchen. The Respondents do not suggest any reason why Santa Maria would have grilled the employees, and no likely reason comes to mind. Santa Maria was at Turtle Bay to inform the employees of three things. He was not there to question them, let alone grill them. Describing Santa Maria's actions as "grilling the employees," when he was merely informing them of three things and spending 15–20 seconds with them, is, at best, exaggerating.

Santa Maria admits being annoyed at Nauta for following him and calling Nauta an "asshole" when they were at the elevator. It is certainly possible that Santa Maria called Nauta other names, but even if he did, the confrontation between Nauta and Santa Maria at the elevator in the main kitchen was brief and did not interrupt any work being done in the kitchen.

It is necessary to clarify what is meant by "a worker being disturbed" or "work being interrupted" because of the possible implication of the access provision of the collective-bargaining agreement, which provides that "there shall be no interference with the normal conduct of business." (GC Exh. 2.) These expressions do not include a worker or a manager who does not like the union or does not want to see union representatives in the workplace. These expressions also do not include greetings between the union representatives and workers in the workplace. Indeed, Ramos acknowledges that such greetings are allowed. The question is, what additional conversation or disturbance, if any, is allowed before it becomes disruptive. Rather than attempt to define the meaning of disturbance or interruption, the meaning assigned by the Respondents will be used. That is, discussions or conversations beyond greetings, which occur in working areas between union representatives and workers, cause disturbances in the workplace.

Taking Santa Maria's actions on August 6 as an example, he wanted to say three things to the workers: greet them; tell them

he is available to answer any questions they might have; and, tell them that dues would be collected in several days on the Kamehameha Highway. Santa Maria spent about 15–20 seconds with each worker conveying this information. The additional consideration is the time of day Santa Maria was going through the kitchens. Santa Maria had arrived at the resort at approximately 4 p.m., and he began going through the main kitchen at approximately 4:45 p.m. The Palm Terrace Restaurant is usually open for service between 6 p.m. and 7 p.m. But Scalzo, the only witness who could credibly address whether 4:45 p.m. was a particularly busy time in the kitchen, did not mention the time of day as being an aggravating factor.

Nevertheless, the Respondents allege that Santa Maria was disturbing the workers, and this claim has merit. Even though Santa Maria's conversation with the individual workers was brief, he was conveying information he wanted them to remember. Thus, the time it took for Santa Maria to convey the information was likely only a portion of the time the workers' attentions were actually diverted.

On balance, the Respondents' contention that Santa Maria "disturbed" the workers on August 6, within the meaning of the above definition, is credible. Nevertheless, the small disturbance created by Santa Maria was greatly exacerbated when Nauta stopped Santa Maria from going to the front lobby, when managers and security guards surrounded Santa Maria for 45 minutes in the kitchen waiting for the police to arrive, and when the Honolulu police officers came and escorted Santa Maria out of the kitchen and off the premises. Neither Santa Maria nor the Respondents backed down during this 45-minute confrontation, with Santa Maria correctly insisting that he had the right to walk through the work areas, and Dougher and the security guards correctly insisting that he did not have the right to disturb the working employees by talking to them.

13. September 23, 2004

The complaint alleges that on September 23, 2004, the Respondents, in the employee cafeteria and in the presence of employees, unlawfully ordered Marsh to stop collecting dues. (Complaint, par. 17(d).) Neither Marsh nor Shimabukuro testified about this event. Dougher testified that Marsh and Shimabukuro were collecting dues in the cafeteria, and they had put two tables together and removed the chairs to facilitate the dues collection. Dougher approached them and told them that collecting dues was disruptive and that they were not permitted to collect dues. After Shimabukuro said that they had a right to collect dues, Dougher said that moving the furniture was disruptive. Dougher's credibility has been considered above. His credibility is not enhanced by him shifting the alleged basis for his disruption claim from collecting dues to moving furniture. It is also apparent that moving the furniture was not the real reason Dougher was attempting to prohibit Marsh and Shimabukuro from collecting dues. In late 2004, Dougher again told Marsh that the Union was not permitted to collect dues at Turtle Bay.

The General Counsel has not addressed the events on September 23 in the factual or legal arguments in his posthearing brief. Accordingly, I conclude that the General Counsel has abandoned this allegation in the complaint.

14. October 22, 2004

On October 22, Butt distributed a memorandum to all Turtle Bay employees dealing with "Temporary Changes in Services." The memorandum states that the changes were "[d]ue to low occupancy." The memorandum contains the following paragraph (GC Exh. 6):

Apparently, the union believes that its boycott and picketing of Turtle Bay Resort is going to cause Benchmark to accept the two-year contract demanded by the union big wigs in Washington. Unfortunately for you, your families, and for everyone associated with Turtle Bay, the union has made a terrible mistake. We would rather close the Resort than allow you and your families to be used as hostages.

This memorandum was distributed to all employees before a meeting was held concerning the memorandum. The date of the meeting was not established. The meeting was open to all employees, but not all employees attended. The memorandum was also distributed at the meeting. At the meeting, Butt explained to the group that his prediction of closing the resort was based on the economic fact that if the business decreased and continued to decline, soon there would be nothing to work with.

15. January 19, 2005

Kimberly Harmon began working as a business agent or organizer for the Union in January 2005. Turtle Bay is her only assignment, and she goes to the resort approximately three times a week. She began going to Turtle Bay in about the mid-January. In a typical day at Turtle Bay, she enters the resort from the loading dock and goes to the security dispatch window. She is handed a folder on which she writes the time of day and where she is going, and she signs her name. She gives the folder back to the security dispatch guard, but not before a security guard is assigned to follow her. Every time she has gone to Turtle Bay, a security guard has followed her.

After signing in, Harmon would go to the employee cafeteria and meet with employees. Upon completion of such meetings, she would walk through the work areas on the ground and first floor levels of the hotel, much like Marsh's practice. She would greet the employees to let them know she is there, and she would return to the cafeteria. The elapsed time between leaving the cafeteria and returning is generally about 10 minutes.

On January 19, Harmon, who did not yet know the bargaining unit members, and her supervisor, Laura Moyer, went to Turtle Bay. Dougher followed them that day, and he stayed within several feet of them. As Dougher was following them, he made notes of their activities in a small, spiral notebook, and he used his cell phone. When Moyer and Harmon were in the upstairs kitchen, Moyer introduced Harmon to some waitresses. Dougher approached them. He told the employees to continue with their work, and he told Harmon and Moyer that they should not be there. Moyer told Dougher that they had a right to be there and they were not disturbing the employees. When Moyer and Harmon were in the Palm Terrace Restaurant, another waitress greeted Moyer. Dougher told the waitress, "You know better than that." (Tr. 1412.) When Moyer and Harmon reentered the kitchen, Moyer observed trays blocking one of the entry doors, and she noted this in her notebook. This angered

Dougher, and he confronted Moye by edging closer to her, pointing his finger at her face, and yelling at her.

Moye and Harmon, with Dougher at their heels, then took the service elevator to the downstairs kitchen. They walked through the kitchen and entered the bakery, a room attached to the kitchen. During this time, Dougher told Moye that she was not permitted in the kitchens, while Moye replied that she had a right to be there. Within 1 or 2 minutes of entering the bakery, Dougher ordered the two workers who were working in the bakery to leave and to go to the human resources department. Moye, Harmon, and Dougher exited the bakery. Moye and Harmon went to the cafeteria. Moye and Harmon met some housekeeping employees in the cafeteria, and they all discussed certain aspects of the housekeepers' jobs. Dougher continued to monitor Moye and Harmon, including eavesdropping on their discussions with employees of Turtle Bay.

16. January 27, 2005

On January 27, Decoite drove Marsh to Turtle Bay. The purpose of their visit was to collect dues in the cafeteria. Marsh had been out of work for part of January because she had hurt her back. January 27 was her first day back on the job. Decoite dropped Marsh at the hotel's lobby entrance because Marsh was unable to climb the stairs at the loading dock, which was her usual entrance into the hotel. Marsh sat on a couch in the lobby as she waited for Decoite to return from parking her car.

As Marsh waited for Decoite to return, Dougher, who was accompanied by a human resource official, came up to Marsh and told her she was not allowed to sit on the couch or to be in the lobby. Marsh explained that her back was causing her discomfort and that she had trouble walking, and she was just waiting for Decoite to return. At that point, Decoite entered the lobby, but she was stopped by Dougher and was told to use the service entrance at the loading dock.

Marsh, with Dougher following, then walked to the closest elevator to go down to the cafeteria. Marsh entered the elevator, but before she could press the button to go down, a guest entered and pushed the button to go up. Dougher then stood at the threshold of the elevator to prevent the doors from closing, and ordered Marsh out of the elevator, telling her that she could not use that elevator. Marsh exited the elevator and attempted to enter another elevator. Dougher moved in front of her, bumped against her, and prevented her from entering that elevator. Marsh's back continued to cause her significant pain, and at this point she sat on a bench next to the elevators.

Dougher summoned a Honolulu police officer to the scene. Dougher told the police officer he wanted Marsh off the property, Marsh had no right to be there, and she was causing a disturbance. The police officer told Marsh she had to leave, but Marsh told him she needed to rest before she would be able to stand. The police officer then left.

As Marsh rested, Dougher kept insisting that she get up from the bench and leave. Marsh asked him if he would help her stand, and he refused. After about 20 minutes, Marsh got up from the bench and, with Dougher still following, walked to the service elevator. She and Dougher entered the service elevator and descended to the lower level. Dougher left Marsh, and she went to the cafeteria and rejoined Decoite.

17. January 28, 2005

At all times before January 2005, the Respondents allowed union representatives who were at the resort on official business to park in the parking lot of the resort without charge. The Respondents were aware of this practice because a resort employee is posted in the driveway kiosk at the entrance to the resort, and because when union representatives would receive parking stickers from the attendant, the representatives would validate the stickers at the security office or the human resources office. Whether this long-standing practice was unusual or even a benefit to the Union is unknown because there is no evidence that the Respondents charge anyone to park at the resort, including the public. The Respondents admit they provide free parking to the public to use the beach. (R. Br. 233 fn. 215.) Moreover, there is no evidence that a union representative ever came to Turtle Bay except to perform union duties and represent the resort's employees pursuant to the collective-bargaining agreement.

On January 28, 2005, Robert Murphy, the Respondents' attorney, sent a letter to the Union stating that union representatives who park at the resort will thereafter be required to pay for parking. The Respondents instituted this change without notifying the Union or giving it an opportunity to bargain. Murphy claimed that the reason for this change was that the Respondents' failure to collect parking fees from union representatives was a criminal act, citing 29 U.S.C. § 186.

18. In and after January 2005

Harmon has been coming to Turtle Bay and performing her duties since approximately the mid-January 2005 to the present. As noted above, every time Harmon has come to Turtle Bay to perform her duties as a union representative, she has been followed throughout the resort and kept under surveillance by a security guard. A security guard was assigned to follow her or was waiting to follow her when she entered the resort and signed the book at security dispatch. Harmon was followed wherever she went in Turtle Bay, except the ladies room where the security guard would wait just outside the door. In general, the security guards stayed within several feet of Harmon, whether she was walking in the hotel or seated in the cafeteria, a distance that permitted the guard to overhear conversations between Harmon and the employees. During such monitoring, the security guards take handwritten notes about Harmon's activities. Following are several examples of security guards following and surveilling Harmon in the parking lot at Turtle Bay while she was performing her duties as a union representative.

a. On February 10, 2005, Adela Trilles, a housekeeper, asked Harmon to walk with her from the loading dock to the parking lot. Because Harmon is under continual surveillance at Turtle Bay, employees sometimes ask to have a discussion with Harmon in the parking lot. On February 10, Trellis approached Harmon at approximately 4 p.m., and Trellis's shift had just ended. They walked into the parking lot discussing a union-related matter regarding the housekeeping department. While they were having their discussion in the parking lot, they noticed two security guards were following about 10 feet behind them and were observing them. Trellis ended the conversation

at that point and departed. Harmon immediately asked one of the guards if they had followed Harmon and Trellis, and the security guard replied, yes. This was the first time that Trellis, a 25-year employee at Turtle Bay, had been followed by security.

b. On March 3, 2005, Harmon met Trellis and three other housekeepers in the parking lot. These housekeepers' shift had just ended and they were going home. As Harmon, Trellis, and another housekeeper were trying to have a conversation regarding work issues, a security guard named Rudy, who was in a golf cart, drove past them and close to them. The housekeepers pulled Harmon out of the way and toward a more protected location on the side of their parked car. Rudy quickly came close to where they were, slowly passed them, and stopped at the back of their parked car, about 3 to 10 feet away. Three of the housekeepers got into the car, but Trellis continued to talk with Harmon. Rudy then said, "That's enough, that's enough." Trellis then ended her conversation with Harmon and got into the car and departed. The housekeepers asked Harmon to call them at home.

c. On March 3, 2005, Harmon was at Turtle Bay for much of the day. Rudy was the security guard who followed Harmon throughout the day on March 3. Nalu Webb is employed as a doorman at Turtle Bay. During the day, Webb asked Harmon to help him with some work issues. Webb's shift ends at 10 p.m., so Harmon agreed to return to the resort when he got off work so that they could confer. They met in the cafeteria after Webb's shift, and Rudy, who was still surveilling Harmon, was observing Harmon and Webb from the table next to them while they tried to have a discussion. Harmon asked Webb if he would like to finish their conversation outside, and he agreed.

The parking lot was very dark, but they stood under a street light on a curbed island in the parking lot. When they finished their conversation, Webb went to his car, and Harmon turned around and saw Rudy on his golf cart. Rudy drove past Harmon and drove toward the security department. She had not seen Rudy in the parking lot prior to this time.

d. On March 10, 2005, Harmon and Stephen Dela Cruz, who is employed in the maintenance department at Turtle Bay, had arranged to meet so that Dela Cruz could give Harmon some signed petitions supporting the Union's position in the ongoing contract negotiations, and Harmon could give Dela Cruz more blank petitions for signatures. They met by the loading dock in front of the security dispatch office after Dela Cruz' shift ended at 4 p.m.

A security guard named Joshua was watching Harmon and Dela Cruz when they were on the loading dock. Dela Cruz was carrying the petitions in a bag, but after seeing that Joshua was monitoring them, he did not give the petitions to Harmon. Instead, Dela Cruz motioned for Harmon to follow him off the loading dock and into the parking lot. As they walked through the parking lot, Joshua continued to follow them, staying about 4-7 feet behind them. Dela Cruz and Harmon walked through one parking lot and into the employee parking lot to Dela Cruz' car, with Joshua close behind. Dela Cruz placed his bag in his car and, as inconspicuously as he was able, removed the petitions from the bag and gave them to Harmon, all the while being monitored by Joshua.

19. March 5, 2005

On March 5, Harmon went to Turtle Bay and was performing her regular duties. Harmon was walking through the Palm Terrace kitchen, and John Dutson, the new manager of the restaurant, told her she was not allowed to be there. Harmon told Dutson that she disagreed with him and that she had a right to be there. Dutson said he had a memorandum that said a union representative was not allowed in the kitchen. Harmon asked to see the memorandum. Dutson said he would get it, and he turned and walked away. Harmon waited, and she then went to Dutson's office, but Dutson could not be found and did not return.

Harmon eventually returned to the cafeteria. As she was sitting there waiting for more employees to arrive, Dougher entered. Dougher walked directly to Harmon and said in a loud voice that he can tell Harmon where she can and cannot go. He repeatedly called her stupid. He told Harmon that she is not permitted to stop employees from working. He said and repeated several times that he was going to discipline any employee that Harmon talks to outside of the cafeteria. Harmon wrote in her notebook some of Dougher's comments. When he saw this, he became even more enraged. Dougher asked Harmon what she was writing, and she said, "When you do things like this, we write them down for the NLRB." Dougher responded by yelling, "The NLRB doesn't run me, the NLRB doesn't know what the hell is going to [sic] here." and "I'm not interested in the NLRB or the rights or anything right now." (Tr. 1481, 3558, 3684.) Employees were present in the cafeteria throughout Dougher's tirade.

Dougher left the cafeteria, but he returned after several minutes. Dougher continued his crude and nasty ranting at Harmon, adding that she was a liar. This latter epithet apparently referred to Harmon's statement to Dutson that she had a right to be at Turtle Bay, a right that Dougher disputed. Dougher then placed two pieces of paper in front of Harmon to (allegedly) prove that she had no right to be at Turtle Bay. These pieces of paper are from some booklet or folder kept by and prepared by the resort's management. When Dougher finally left the cafeteria, several employees who had witnessed his actions came over to Harmon and asked her if she was all right.

#### *D. Discipline of Employees*

1. May 30, 2005

Jeannie Martinson is a hostess at the Palm Terrace Restaurant. She has been employed at Turtle Bay for 25 years. On May 21, Turtle Bay employees participated in a 1-day strike. On May 22, Martinson was speaking to a cook in the kitchen of the restaurant. The cook said, "Looks like all the young kids worked yesterday." Martinson replied, "Oh, looks like we are working with a bunch of scabs." (Tr. 348.) Martinson was joking with the cook, and they both were laughing during their conversation. Nothing more was said by Martinson on this subject. Martinson made no threats or physical gestures or contact with or toward anyone.

Leslie Toy, a waitress who had been employed at the resort for approximately 6 months, was in a corner of the kitchen setting up trays during this conversation, and she overheard

Martinson's reference to scabs. Martinson did not know that Toy had overheard her brief discussion with the cook. Toy was not offended or threatened by Martinson's use of the word "scabs." Toy made no complaint to anyone about what she had overheard.

Several days later, Toy's managers, John Dutson and Joseph Maher, approached her and asked her to follow them to the human resources office where they met with Ramos. Dutson or Maher told Toy that he had heard that Toy had overheard Martinson's conversation with the cook. Toy then confirmed what she had overheard Martinson say to the cook. Ramos suggested to Toy that such a statement threatened or intimidated her, but Toy denied that she was threatened or intimidated. Neither Ramos nor the managers asked Toy to provide a written statement.

On May 28, approximately 1 week after Martinson's reference to "scabs" in her conversation with the cook, Ramos issued a memorandum to all Turtle Bay employees entitled "Employee Action—Walk Out." (GC Exh. 22.) That memorandum included the following statement: "Those that chose [sic] to work during an action (walkout) have the right to work and their decision to work should also not meet with snide remarks (scab), harassment and confrontation on the picket line and and [sic] at work."

On May 30, Maher delivered a "Corrective Action Form" to Martinson, correcting and warning her because of her statement to the cook on May 22. (GC Exh. 21.) Maher and Ramos signed the form in which they accuse Martinson of displaying "inappropriate, disrespectful, and unjustified behavior towards a fellow employee by calling her a 'scab.'" The form also contains a threat that if such behavior should happen again, Martinson could receive "decision making leave, or if your behavior is more severe, a suspension/termination."

## 2. June 10, 2005

Timothy Barron is a banquet waiter at Turtle Bay and has been employed at the resort for 28 years. He is a shop steward and has held that position for approximately 5 years. Barron participated in the 1-day strike on May 21 by walking a picket line with other employees in front of the resort. Barron walked the picket line from 5:30 a.m. to the evening.

On June 4, Barron was leaving work at the end of the day and was "swiping out" at the timeclock near the security dispatch window and the loading dock, as all employees must do. Eric Baeseman, a valet who has been employed at Turtle Bay for approximately 9 years, was at the security dispatch window at the same time. Barron was leaving work and Baeseman was coming into work. Baeseman is a member of the bargaining unit, but he resigned his union membership in approximately June 2005.

Barron asked Baeseman if he had crossed the picket line on May 21. Baeseman said he did. Barron said that people would think of Baeseman as a scab. Baeseman replied that he had to feed his family. Barron reminded Baeseman that Barron and a number of employees had not crossed the picket line, and that he also had to feed his family. Baeseman said he would cross the picket line again if there were another walkout, and Barron repeated that people would think of him as a scab. Barron

claims that he did not directly call Baeseman a scab, and that claim is true. Barron said that others would regard Baeseman as a scab. However, as a practical matter, the effect of Barron's statements was to label Baeseman as a scab even though Barron did not directly call Baeseman a scab. In any event, Barron made no threats or physical gestures or contact with or toward anyone.

Baeseman was not a credible witness when he was describing his encounter with Barron. In describing what he claims occurred between himself and Barron, he was cheerful, even flippant. When describing his reaction to Barron's alleged statements, Baeseman twice said, "I'm like whoa." (Tr. 2093.) This testimony was given in a casual, lighthearted tone, a tone that was inconsistent with the event being described and with Baeseman's alleged reaction to Barron's comments. Indeed, Baeseman claims that Barron called him a scab three times, making Baeseman feel upset and uncomfortable, so uncomfortable that he immediately reported Barron's comments to Anthony Hite, a security guard. Baeseman continued his lighthearted approach to this event by describing how he reported the event to Hite. Baeseman testified that he told Hite, "I don't appreciate what Tim is saying to me. He's calling me a scab, dah, dah, dah." (Tr. 2095.) Again, the tone of this remark was casual, even flippant. Moreover, Baeseman's testimony likely does not accurately describe what Baeseman actually told Hite.

Baeseman also displayed a bias, vivified through exaggeration, similar to the tendencies displayed by other Turtle Bay employees, such as Sonia Evans (see above), and Derek Mendivil (see below). For example, Baeseman testified on cross-examination that Barron used vulgarity against him during their encounter at the security dispatch window. He then described his encounter with Barron and said that Barron's tone was "like bold lettering." (Tr. 2106.) Baeseman then pretended surprise when counsel explained that when he had asked Baeseman about vulgarity, he meant swear words. Baeseman then admitted that Barron had not used swear words. Thus, Barron did not use vulgarity in his encounter with Baeseman, and Baeseman's statement to the contrary was an exaggeration and a misrepresentation.

Baeseman claims that Barron's comments made Baeseman feel upset and uncomfortable. This testimony is not credible, a conclusion supported by Baeseman's demeanor in describing the event. At most, Baeseman knew that the resort had recently issued a memorandum saying that employees who cross the picket line should not be called scabs, and since Barron told him that he was being called a scab, he could get Barron, a shop steward in a union that Baeseman had just quit, in trouble by reporting the event to the security department. Moreover, the fact that Baeseman manufactured his reaction to Barron's scab comment is shown by Baeseman's statement to Barron, after they both had completed security office reports on the incident, that "it's up to me to let it [Barron's comment] bother me." (Tr. 2098.)

The practical difference between Barron's description of the event and Baeseman's description is not as great as the technical difference. Practically, Barron told Baeseman that others regarded him as a scab. However, Baeseman knew that Barron was associated with many people who considered Baeseman to

be a scab. Nevertheless, Barron did not actually call Baeseman a scab. Baeseman may not have appreciated the difference at the time, but perhaps he would have if he had not so quickly reported Barron to the security department. In its ongoing dispute with the Union, the Respondents developed a climate at Turtle Bay that encouraged employees to report other employees who said anything against Turtle Bay. This climate exacerbated the tensions among the employees and resulted in minor disagreements and retorts being blown out of proportion. In any event, the Respondents contend that Barron called Baeseman a scab, and this is the single reason for the discipline of Barron that followed.

When Baeseman said he was going to file a report with the security department, Hite was coming through the double doors that separate the timeclock area from the security department. Hite asked Barron what he had said, and Barron disingenuously said that his “scab” remark dealt with a scab he had on his hand. Baeseman said he wanted to file a report, and after he said this, Barron said that he also wanted to file a report. Hite then took Baeseman into the security offices and stayed with him and assisted him in preparing his report. Hite witnessed Baeseman’s report. Barron was left on the loading dock and given a form to complete. No security guard assisted Barron or witnessed his report. The difference between the treatment of Baeseman, an antiunion employee, and Barron, a prounion employee, by the security guards is striking.

When Barron completed his report and was leaving, Hite asked him if he was coming in or going out. Barron said he was leaving. Hite replied that he would have to “write you up” because Barron was swiping out wearing his regular clothes. Turtle Bay employees wear uniforms at work. They are supposed to change their clothes after they swipe out, not before.

The next day, June 5, Hite solicited Baeseman to fill out another report. This second report deals with comments between Baeseman and Barron as they were leaving the security office on June 4. Barron told Baeseman that he could call Baeseman a scab in public, i.e., off Turtle Bay grounds. Hite was present for this encounter, and Hite told Barron that he could not call Baeseman a scab in public. (R. Exh. 13.)

On June 10, Barron came to work, and as he entered the hotel, several security guards met him at the loading dock. One guard, Nagy, escorted Barron to Dougher’s office. Dougher allowed Harmon to represent Barron. Dougher asked Barron what happened on June 4, and Barron told him what occurred, consistent with the report Barron had filed. (GC Exh. 34.) Dougher told Barron that he was being suspended pending an investigation, and followed up with a written notice of Barron’s suspension.

On June 11, Ramos met in her office with Barron, who was represented by Moye and Harmon. Barron provided a more complete, written report of the June 4 conversation between himself and Baeseman. Ramos upheld the suspension imposed by Dougher and set a return to work date of June 15. Accordingly, Barron was suspended for 5 days. In upholding Dougher’s suspension, Ramos made clear that the reason for the suspension was Barron having called Baeseman a scab more than once on June 4. (GC Exh. 24.) Barron was sus-

pended for 5 days without pay. This is the first time Barron had received any discipline in his 28 years at the resort.

When Barron first explained his remarks to Hite, he said that his statement to Baeseman about a scab referred to a wound that he had on his hand. This explanation was not truthful. Indeed, under these circumstances, the explanation was ludicrous. The question is what effect this false explanation has on Barron’s credibility.

Barron’s encounter with Baeseman at the security dispatch window occurred about a week after Ramos’s May 28 memorandum dealing with employee conduct. In that memorandum, Ramos cited the word “scab” as the only example of what one employee should not call another. (GC Exh. 22.) Both Barron and Baeseman knew about the memorandum. The union-management relationship at Turtle Bay had been deteriorating for the previous 18 months. The open hostility of the Respondents to the Union was apparent. Examples of this hostility include the shadowing of union representatives whenever they came onto the resort property; bringing in the Honolulu police several times to remove union representatives from the property; Butt’s October 22 memorandum threatening to close the resort; Dougher shouting that he would discipline anyone seen talking to the union representative; and, Dougher belittling Harmon in the employee cafeteria. Barron was a union supporter and a shop steward. He had been employed at the resort for 28 years. He was understandably concerned, and his false explanation to Hite—that his use of the word “scab” referred to a wound on his hand—grew out of that concern. At the hearing, Barron presented as an honest and credible witness.

On June 11, 1 week after Baeseman’s encounter with Barron, Baeseman said to a coworker, “This is bullshit and you better back off.” Baeseman received a suspension of 3 or 4 days for making this threat against a coworker. In contrast, Barron did not use vulgarity against Baeseman and did not threaten him.

### 3. July 1, 2005

Mark Feltman was a first-class maintenance employee at Turtle Bay from September 2004 to July 1, 2005. On November 4, 2004, within 2 months of when he started working at Turtle Bay, Feltman made a complaint to Ramos about Marsh. Feltman complained that Marsh had remained at his lunch table too long after he asked her a question during lunch. Ramos responded to this relatively minor matter by preparing a two-page affidavit concerning Feltman’s lunch meeting with Marsh. Ramos then called Feltman into her office to sign the affidavit, which Feltman did.

Within approximately 1 month of Feltman’s complaint against Marsh, Ramos had a discussion with Henry Lacar about Feltman, and they agreed that Feltman was a good employee. They discussed raising Feltman’s pay. Ramos then told Feltman he was doing a good job at the hotel and his supervisor, Lacar, was pleased with Feltman’s work. Ramos also told Feltman that he might be getting a raise in pay, which would be above the limits established in the current collective-bargaining agreement. She told Feltman to keep up the good work.

Feltman never did receive a pay raise. On February 22, 2005, Feltman came to Ramos’s office to pick up his lunch ticket. He was wearing a union button. Ramos was surprised and com-



mented that Feltman was wearing a union button. Ramos said, "I thought you signed the antiboycott petition that Roger Corpuz was circulating around the hotel." Feltman said, "No," and Ramos replied, "Oh, oh." (Tr. 516.)

On March 3, 2005, Feltman again went to Ramos's office to pick up a lunch ticket. He was wearing a union button. He met Sandi Grundmanis, the training manager in the human resources department. Grundmanis saw the union button and told Feltman, "I thought you were [a] more sensible guy, but who am I." (Tr. 517.)

On May 21, Feltman participated in the 1-day strike by walking the picket line with other employees in front of the resort. Feltman walked the picket line from 5:30 a.m. to 6:30 p.m. Dougher was present throughout the day observing the picketers. At one point during that day, Feltman was having a conversation with his uncle who was staying at Turtle Bay and who had just crossed the picket line in his car. Dougher came up to Feltman and interrupted Feltman's conversation with his uncle, and told Feltman's uncle that he must leave that location. On another occasion during that day, John Dowd, who is in charge of public relations for Turtle Bay's golf courses, was leaving the property in his vehicle. He brought his vehicle within inches of the person who was directing traffic for the picket line. Feltman asked him to move back. Dowd said to Feltman, "Do you know who I am? You know who you are talking with?" Feltman replied, "I don't care who you are. Move your car back. You are too f—ing close to the person."<sup>6</sup> (Tr. 524–525.)

On June 9, 2005, a hearing was held in Federal district court for the District of Hawaii in a lawsuit filed by the Respondents against the Union. The Respondents were seeking a temporary restraining order against the Union. The district court denied the Respondents' application for a temporary restraining order. Among the Respondent's witnesses at the hearing was Derek Mendivil. Mendivil is employed at Turtle Bay as a general cleaner. He started working for Turtle Bay in 2004. After Mendivil testified in Federal court on behalf of the Respondents, a hotel manager instructed him that if anyone asked about the union, or if anyone asked him about his day in court, he must report this to his manager, Tonilynne Cano.

When Mendivil came to work on June 10, he was "feeling good." (Tr. 2450.) Security guard Kamalani Keliikuli approached him, and she asked if he was all right. She said to Mendivil, "If anyone bothers you, you let the security know." She also said, "You know, there are four union representatives here, and, if anything happens, you let us know." (Tr. 2439.) At this point, Mendivil started feeling scared. Mendivil went to the cafeteria, and he saw four union representatives there. The union representatives made no statements to or gestures toward Mendivil. Indeed, Mendivil told Keliikuli that the union representatives had not seen him. Nevertheless, Mendivil claims that he remained scared.

Mendivil exited the cafeteria, went to the bulletin board that was posted in the hallway next to the security office and the human resources office, and began reading some of the postings. Feltman had just exited the men's room on the lower level

of the hotel and was returning to the maintenance shop. He passed behind Mendivil who was reading notices on the bulletin board. As Feltman was walking by Mendivil, he greeted Mendivil by saying, "Howz it," a local expression meaning how are you. Mendivil said, "[H]i." Feltman and Mendivil were acquaintances at work, but they did not socialize together. Feltman said, "How was court yesterday?" Mendivil remained looking at the bulletin board, and he shrugged his shoulders, but he did not respond. What happened next is disputed.

Mendivil states that Feltman said, "F—ing ass" as he continued walking back toward the maintenance shop. Feltman states that after Mendivil shrugged his shoulders, but did not otherwise respond to Feltman's question about court, he continued walking back to the maintenance shop without saying anything further.

Mendivil immediately left the building and went to his work area where he told Cano what had happened. Cano is the director of housekeeping. Cano called Dougher at the security office and reported what Mendivil had told her. Cano then told Mendivil to go to the security office and fill out a report on what Feltman had said. Mendivil went to the security office, and Cano followed him "to give him support." (Tr. 2368.) Before Mendivil reached the security office, he met Dougher who was coming from that office. Dougher was responding to Cano's telephone call and was going to see Feltman. After Mendivil arrived at the security office, he claims that he was so disturbed by Feltman's statement that he was unable to express himself. This claim is not credible because Mendivil was observed when he was waiting in the security office for Cano to arrive. Mendivil was calm and appeared to be patiently waiting for his turn. In any event, when Cano arrived, she offered to write the report for Mendivil, and he agreed. In Cano's report, she wrote that Feltman said, "[F]—ing ass" to Mendivil before walking away. (R. Exh. 18.)

Dougher went to the maintenance shop and told Feltman, "I need to talk to you. You probably need a representative. Derek said you harassed him in the hallway. But I can tell you right now, I['ll] meet you in your boss's office in ten minutes." (Tr. 531.) Feltman went to the cafeteria. Gill happened to be present in the cafeteria with Harmon and Moye, and Gill agreed to represent Feltman. The meeting was held in Lacar's office with Dougher, Lacar, Cano, Mendivil, Feltman, and Gill. Dougher was waiting for Cano and Mendivil, so he did not begin the meeting until they arrived. When Cano entered, she handed the report she had written for Mendivil to Dougher.

Dougher read the report aloud. He then handed the report to Gill for him to read. Dougher asked Feltman to explain what happened. Feltman explained, but he did not admit to having cursed at Mendivil. Nevertheless, Feltman's statement to Dougher does not appear to have had any impact on Dougher's decision. Dougher stated that Feltman was suspended pending investigation because Feltman had violated the Respondents' "zero-tolerance policy" on harassment, retaliation, and workplace violence.

Dougher explained that the Respondents' zero-tolerance policy meant that Turtle Bay makes a note of every instance of harassment, retaliation, or workplace violence. This policy does not mean that Turtle Bay would or would not do anything when

<sup>6</sup> The word fuck is designated throughout this decision as f—, and, as a present participle, f—ing.

it believes that harassment, retaliation, or workplace violence has actually occurred. The policy simply requires the resort to make a note of it. What the resort may do as a result of harassment, retaliation, or workplace violence, if anything, depends on the facts of each case.

There is no evidence that Mendivil was actually upset or agitated during the meeting in Cano's office, nor any evidence that he displayed those characteristics. After the meeting, Mendivil was escorted back to the security office to fill out an injury report. (GC Exh. 26.) Mendivil claims that at the time he completed this report, he "felt scared and terrified, and I was all shaken up, and I couldn't concentrate." (Tr. 2427.) This injury report is the only written report of the incident completed by Mendivil, and he does not mention that Feltman cursed at him in the hallway. In Mendivil's report, the only listed cause for his alleged distress was his being required the day before to go to court and testify.

After Mendivil completed the injury report, Cano told him to go to the emergency room at the local hospital. Accordingly, Mendivil went to the emergency room. Security guard Keliikuli followed Mendivil to the hospital because Mendivil requested that she accompany him. Mendivil felt it would be easier for him if the security guard were there to tell the doctor what had occurred. It should be noted that, after his encounter with Feltman, the first three times Mendivil was asked to tell what happened, he twice had someone else tell the story. And, the one time Mendivil wrote his own report, he failed to mention that Feltman had cursed at him.

Keliikuli told the emergency room physician, Dr. Moire, of the circumstances surrounding Mendivil's injury. Moire recommended that a coworker should be present while Keliikuli explained what had occurred, but no coworker was brought in. Moire said that Mendivil's injury did not warrant any time off from work and she was reluctant to approve it. However, Mendivil and Keliikuli persisted, and Moire did approve time off for Mendivil. Mendivil then stayed out of work for a week.

The next day, Ramos, who had been off the island, scheduled a meeting in her office to discuss Feltman's suspension. Present at the meeting were Ramos, Feltman, Harmon, and Moyer. Feltman explained to Ramos what had occurred during his encounter with Mendivil, which was the same explanation he had given to Dougher the day before. Ramos said that she would conduct a full investigation and would contact Moyer and Harmon.

There is no evidence that Ramos conducted any investigation into the encounter between Mendivil and Feltman. However, she did discover from Lacar, assuming she did not already know, that Feltman participated in the 1-day strike and walked the Union's picket line on May 21. In any event, on the day Ramos met with Feltman, Harmon, and Moyer, she decided to terminate Feltman's employment. On approximately July 2, Ramos sent Feltman a written notice that his employment with Turtle Bay was terminated effective July 1. The reason given for Feltman's termination was that he had threatened Mendivil, a witness in a Federal court case, which was a federal crime.

In considering whether Ramos's assertion that Feltman had committed a Federal crime is reasonable or whether Ramos's assertion is a pretext for the Respondents' real reason for ter-

minating Feltman, the first question is whether Feltman actually called Mendivil a "f---ing ass." The preponderance of the evidence supports Feltman's claim that he did not.

Mendivil professes to have such a weak constitution that, on the basis of a fellow employee calling him a "f---ing ass," he becomes so emotionally distraught that he goes to a hospital emergency room. Mendivil compounds that exaggerated and extravagant reaction by staying out of work for 1 week because of his "injury." The Respondents have not objected to Mendivil's overblown reactions. Indeed, the Respondents have supported and encouraged Mendivil's reactions, at least in part because of the appearance of legitimacy those reactions give to the Respondents' discipline of Feltman. In other words, since Mendivil went to the hospital and stayed out of work for a week, surely Feltman must have done something wrong, if not criminal.

There are several reasons why Mendivil's present account of the incident is not credible. First, Mendivil's demeanor showed him to be impressionable and unassertive. Mendivil presented as a submissive person who would be susceptible to authoritative and authority figures. Thus, Mendivil did not even complete the initial report of his encounter with Feltman. Instead, Cano completed the report for him. Moreover, Mendivil is a family friend of Cano, Mendivil's father is a friend of Cano, and Mendivil went to school with Cano's son. Mendivil and Cano are known to be good friends. (Tr. 2512.) In addition, Mendivil wanted a security guard to accompany him to the hospital in order to tell the emergency room physician what had happened.

Although Cano wrote the report for Mendivil, her reliability is problematic. For example, Cano testified that she wrote her own report of the incident between Mendivil and Feltman on June 10. A day or two later, Ramos told Cano that Cano's report had been lost, and Ramos requested Cano to prepare another report. Cano testified that she then prepared a second report, which she did completely from memory, and that she used no documents to help her in preparing the second report. Cano repeated this testimony on direct and on cross-examination. Ramos later found Cano's first report. An examination of the two reports shows that the first 1-1/2 pages of Cano's second report is a verbatim copy of her first report, including spelling and grammatical errors. It is evident that Cano copied her first report when she was preparing her second report, and that her testimony denying this is not true. Thus, Cano, in an attempt to enhance the reliability of her report by demonstrating that she recalled the incident in the same manner several days after the incident, actually shows that she is not credible.

When Mendivil came to work on June 10, the security guard warned him that union representatives were in the cafeteria. There is no evidence that the union representatives had done anything to warrant "warning" persons about their presence. The security guard then told Mendivil to report to her if the union representatives bothered him. Mendivil testified that after these (apparently unnecessary) warnings he became scared. Thus, the Respondents are responsible for scaring Mendivil, not the union representatives or Feltman. And, while Mendivil was

in this tense and vulnerable state brought on by the Respondents, he had a brief encounter with Feltman.

For all these reasons, Mendivil would likely accept the truth of whatever Cano wrote for him in her report. At the least, there is substantial confusion between what is contained in that report and what Mendivil might independently remember. Also, while Cano wrote in her report that Feltman cursed at Mendivil, Mendivil failed to mention Feltman's curse in the one report Mendivil wrote after the encounter. On balance, Mendivil was not credible when he testified that Feltman cursed at him as Feltman was passing by Mendivil at the bulletin board.

Adding further confusion to Mendivil's claim at the hearing that Feltman called him a "f—ing ass" is Mendivil's accusation that another employee, David Stone, called him the same name on a previous occasion. Mendivil claims that Stone squirted Mendivil with a water gun and called Mendivil a "f—ing ass." Stone received no discipline for these actions. Curiously, there is no evidence that Mendivil went to the hospital after Stone called him this name, nor is there any evidence that Mendivil took a week off from work after Stone called him this name. However, the lack of such outlandish reactions could possibly be explained by the fact that Cano did not tell Mendivil to go to the hospital after Mendivil's encounter with Stone, but Cano did tell Mendivil to go to the hospital after Mendivil's encounter with Feltman. Nevertheless, this latter explanation tends to show that the Respondents were otherwise motivated to punish Feltman, but they were not similarly motivated to punish Stone.

Alternatively, Mendivil's failure to go to the hospital after Stone called him a "f—ing ass" tends to show that neither Stone nor Feltman called Mendivil a "f—ing ass." The coincidence between the events, with Mendivil being called the exact same name at different times by different persons, strains credulity. Moreover, this conclusion explains Mendivil's widely divergent reactions to the same epithet. In any event, Mendivil claims that two different employees called him the same name on two different occasions and allegedly for two different reasons. In light of Mendivil's impressionable nature, and the suggestive and solicitous actions of Cano and the security guards, it is also possible that Mendivil confused the incidents and attributed to Feltman what Stone had previously called Mendivil. Both of the foregoing explanations are consistent with Mendivil's demeanor, which was marked by hesitancy, unease, and obsequiousness. In short, Mendivil was not a credible witness.

Considering all of the circumstances, I conclude that the following occurred at Mendivil's meeting with Feltman. After talking with the security guard, Mendivil became upset and scared. Feltman saw Mendivil and asked him how his day at court was. This increased Mendivil's fright. Feltman did not say "f—ing ass" to Mendivil. However, because Mendivil had been told by a hotel manager to report to his supervisor if anyone asked him about his day in court, and because the security guard had solicited Mendivil to report any union person who bothered him, Mendivil went to his supervisor, Cano. Sometime after talking with Cano and Dougher, but not before completing his own report of the incident, Mendivil became convinced that Feltman had called him a "f—ing ass," possibly confusing his previous Stone encounter with his present

Feltman encounter. Mendivil did not appear to be a person who would prevaricate about his encounter with Feltman. However, Mendivil also did not appear to be a person who was fully in control of his thoughts, and to that extent, his recollection.

In addition, Mendivil had previously complained to his managers about another employee, Aso Lautalo, who Mendivil reported had pushed and harassed him. Like Stone, and despite the Respondents' claim of having a zero-tolerance policy for harassment, Lautalo received no discipline for this harassment and physical assault.

With respect to Mendivil's allegation that Feltman cursed at him, Ramos acknowledged that employees quite frequently use "f—," and if she suspended employees, much less terminated them, for such conduct she "wouldn't have a staff, honestly." (Tr. 432.) Accordingly, the Respondents treat instances of cursing between employees by either imposing no discipline (Stone) or imposing discipline that is less severe than termination. For example, Geronimo Pinacate was suspended for repeatedly using f— to a coworker, and for continuing to use such profanity after he was told to stop. Also, on May 21, 2005, Kaleo Delosantos, while crossing the picket line, told an employee on the picket line to "f— off." Delosantos received a written warning for this conduct. There is no evidence that any employee has been terminated for cursing, except Feltman. Moreover, Feltman did not first receive a written warning or any other form of progressive discipline.

Ramos's protestation of honesty insofar as her assertion that she would not be able to maintain a staff if she disciplined every employee who said "f—" on the job warrants an explanation of why Ramos otherwise was not a credible witness at the present hearing. Ramos was the Respondents' designated representative to assist the Respondents' attorneys during the hearing. Accordingly, Ramos was permitted to remain in the hearing room throughout the trial. A rule on witnesses was granted at the beginning of the hearing and was explained to Ramos while she was on the witness stand. Ramos was instructed that the rule on witnesses "means that anyone who is in the hearing, when they get off the witness stand, whether they are going to get back on or not, cannot talk to anybody else who is going to be a witness about the things that went on in the hearing." (Tr. 203.) Moreover, Ramos heard this same or similar instruction repeated to every witness at the hearing.

Ramos was also present when the purpose of the order was explained (Tr. 272):

[T]he reason is, is that by discussing it [testimony in the hearing] with other people, you run the risk of having people who will be witnesses hearing what has occurred in this courtroom and then having them or having us risk those people conforming their testimony to the testimony that has already been given or, on the other hand, not conforming it but making it different from the testimony that has already been given.

Our intent and desire is to have the testimony of witnesses with as much integrity as is possible. We want to have a good, clean hearing so that everyone's rights are protected. So by talking about the testimony before the hearing is over, you run the risk of someone, I don't know

the right word, but poisoning the hearing, poisoning the testimony that might come later on.

Thus, Ramos knew what the order prevented her from doing, and knew that the purpose of the order was to insure a proper hearing where everyone's rights would be protected.

The present hearing was held in two sessions, covering 2 weeks in July 2005 and 2 weeks in October 2005. After the July session ended, the Respondents' attorneys provided Ramos with a copy of the transcript of the July session. Ramos then contacted Rebecca Farrell, who is the spa director at Turtle Bay and is employed by Benchmark. Farrell had participated with Ramos in the disciplinary meetings on June 11 involving Barron and Feltman. Ramos knew that Farrell would be a witness for the Respondents when the hearing resumed in October. Ramos admits she told Farrell to come to Ramos's office and read Feltman's testimony because Feltman had "lied on the stand." (Tr. 2926.) Farrell testified that Ramos told her to review the testimonies of both Barron and Feltman, and to review these testimonies in order to jog Farrell's memory. (Tr. 2712.)

According to Ramos's version, Ramos was coaching Farrell by telling her that Feltman had lied in his testimony, and that Ramos expected Farrell's testimony to be different. However, Farrell contradicted Ramos's testimony and said that Ramos had told her to review both Feltman's and Barron's testimonies. In any event, Farrell came to Ramos's office and read the transcripts on Ramos's computer. Ramos also printed hard copies of the transcript for Farrell. Moreover, Ramos shredded the transcripts after Farrell returned them to Ramos's office, indicating that Ramos knew she had violated the order against disclosure and was destroying the evidence of her violation.

Ramos deliberately and willfully violated this judge's order prohibiting the disclosure of witnesses' testimony. Moreover, neither Ramos nor the Respondents' attorneys disclosed Ramos's violation of the order. Rather, Farrell disclosed this on cross-examination. Indeed, Farrell disclosed the violation in a casual, off-hand manner, indicating that Farrell was not aware of the order during her testimony, and/or that Ramos routinely violated the order.

It is one thing for a single witness to violate an order prohibiting the disclosure of testimony to prospective witnesses. But it is another matter when the Respondents' designated representative—who was present for the entire hearing and heard the testimony of all the General Counsel's witnesses, who is Turtle Bay's director of human resources, and therefore possesses substantial authority over the employees at Turtle Bay, who was individually instructed not to disclose testimony, and who heard similar instructions given to every other witness—violates the order and does so in such a deliberate, calculated manner. On balance, and considering Ramos's demeanor and her actions away from the witness stand, Ramos was not a credible witness during the present hearing.

Even if one were to accept the truth of the Respondents' charge against Feltman, viz, that he said, "f—ing ass" to Mendivil, there is a substantial question concerning what Feltman was referring to. It is undisputed that Feltman asked Mendivil, "How was court yesterday," and that Mendivil did not answer Feltman. If Feltman then called Mendivil a "f—ing ass," he

could just as likely, or more likely, have been referring to Mendivil's refusal to answer him as anything else. Indeed, the alleged epithet immediately followed Mendivil's refusal to answer, not the reference to federal court. Moreover, Feltman made no reference to Mendivil's status as a witness in the Federal court case. Under the circumstances, it is equally likely that Feltman was referring to Mendivil's refusal to answer, not Mendivil's status as a witness in federal court. Nevertheless, the Respondents promptly, and apparently without question, charged Feltman with threatening Mendivil because Mendivil had testified in Federal court.

Finally, the reasonableness of the Respondents' charge against Feltman suffers from the presumptiveness and guesswork in labeling the epithet "f—ing ass" a threat. Calling someone a f—ing ass is not a threat. It rather crudely expresses an opinion, but it is not a threat. On the other hand, the Respondents have demonstrated that they recognize a threat when it occurs, such as when Baeseman told a coworker, "This is bullshit and you better back off." Yet, for this threat, the Respondents did not discharge Baeseman.

#### *E. The Union's Requests for Information*

On April 28, 2004, the Union sent a letter to the Respondents, through their attorney, requesting information pertaining to condominiums that Turtle Bay was constructing at the resort. This information was requested "[p]ursuant to our ongoing negotiations and in order to understand the potential impact of the [condominiums] on our bargaining unit members." (GC Exh. 42.) On August 30, 2004, the Union sent another letter to the Respondents requesting additional information on the condominiums. The condominiums were completed between April and June 2005. Occupancy of the condominiums began during the second quarter of 2005. The Respondents did not provide any information in response to the Union's requests for information until September 14 and 15, 2005.

On September 13, 2004, the Union sent a letter to the Respondents requesting monthly gross earnings paid to bargaining unit members. Ramos testified that she directed the "pay master" to send the gross wages for union employees to the union. Ramos's testimony was vague, she did not identify when she gave this directive or the name of the person to whom it was given, she did not state whether she ever followed up with the "pay master" or whether the "pay master" ever acknowledged to her that he sent the wage information, and the Respondents provided no documentation that the wage information was sent to the Union or corroboration of Ramos's testimony. In short, Ramos's testimony is not credible, and, in any event, it does not establish that the requested information was sent to the Union. Accordingly, the Respondents have not provided the wage information requested by the Union on September 13.

#### IV. ANALYSIS

##### *A. Requests for Information—Complaint Paragraphs 7, 8, and 9*

"There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties." *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967).

These duties encompass the union's responsibilities as bargaining representative for employees under the Act. The employer's obligation extends to information involving labor-management relations during the term of an existing collective-bargaining agreement and in preparation for negotiations involving a future contract. The employer's obligation also extends to information in furtherance of, or which would allow the union to decide whether to process, a grievance. *Id.* at 436; *Bickerstaff Clay Products*, 266 NLRB 983 (1983).

The standard for relevancy is a liberal, "discovery-type standard." *NLRB v. Acme Industrial Co.*, 385 U.S. at 437. Accordingly, information that is "potentially relevant and will be of use to the union in fulfilling its responsibilities as the employees' exclusive-bargaining representative" must be produced. *Pennsylvania Power Co.*, 301 NLRB 1104, 1104-1105 (1991). The requested information need not be dispositive of the issue for which it is sought, but need only have some bearing on it. *Id.* at 1105. "An employer must furnish information that is even probably or potentially relevant to the union's duties." *Conrock Co.*, 263 NLRB 1293, 1294 (1982).

Information pertaining to employees within the bargaining unit is presumptively relevant. *Postal Service*, 332 NLRB 635 (2000). On the other hand, the union must show the relevance of information that does not concern employees in the bargaining unit. In keeping with the liberal standard of relevance, this burden is not a heavy one and only requires the union to demonstrate more than a mere suspicion of the matter for which the information is sought. *Sheraton Hartford Hotel*, 289 NLRB 463 (1988); *United Graphics*, 281 NLRB 463, 465 (1986) ("Although the union has the burden of proving the relevance of information concerning employees outside the bargaining unit, the standard for relevancy is the same 'liberal discovery-type standard' in all cases."). Moreover, "information concerning subcontracting of unit work is relevant to a union's performance of its representational functions." *Island Creek Coal Co.*, 292 NLRB 480, 492 fn. 18 (1989).

With respect to the Union's April 28 and September 30 requests for information, the Respondents do not claim that the requested information is not relevant. Rather, the Respondents claim that the requested information did not become available until the construction of the condominiums was completed. However, the condominiums were completed between April and June 2005. In addition, the Respondents could have immediately provided some of the information that the Union requested in its April 28 letter, but they did not. This information includes whether Turtle Bay had any current plans to convert hotel rooms to other uses, including condos or timeshares.

An employer has a duty to timely furnish information requested by the union. *Woodland Clinic*, 331 NLRB 735 (2000). This duty requires the employer to furnish the information "as promptly as possible." *Pennco, Inc.*, 212 NLRB 677, 678 (1974). An unreasonable delay in responding to an information request can be just as violative of the Act as an outright refusal to produce. *Control Services*, 315 NLRB 431 (1994). Also, the Respondents and the Union were involved in contract negotiations during the entire period that the Unions' information requests remained unanswered. This circumstance makes the Respondents' duty to timely reply even more compelling.

The Respondents' defense that it did not have the requested information is incomplete because the Respondents' failed to provide the information that was immediately available, such as whether Turtle Bay had any current plans to convert hotel rooms to other uses, including condos or timeshares. The Respondents' defense also fails to explain or account for its delay in providing the information from approximately May to September 2005. An unreasonable delay in providing information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all. *Amersig Graphics, Inc.*, 334 NLRB 880, 885 (2001); *Valley Inventory Service*, 295 NLRB 1163 (1989); *Newcor Bay City Division*, 345 NLRB 229 (2005). Under the circumstances, the Respondents' September 14 and 15, 2005 answers to the Union's April 28 and September 30, 2004 requests for information were untimely and a violation of the Act. Accordingly, the Respondents unreasonably delayed producing the Union's requested information, and such action violated Section 8(a)(5) and (1) of the Act.

The wage information requested by the Union on September 13, 2004, is presumptively relevant. *Postal Service*, 332 NLRB 635 (2000). The Respondents have not provided this information to the Union. Accordingly, the Respondents have violated Section 8(a)(5) and (1) of the Act.

#### *B. Rules and Regulations Governing Turtle Bay's Employees—Complaint Paragraph 24*

1. Handbook, pages 32; rules and regulations, page 2. In determining whether the maintenance of certain work rules violates Section 8(a)(1) of the Act, "the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park*, 326 NLRB 824, 825 (1998). Employees' rights under Section 7 extend to communications about working conditions with other employees, the employer's customers and advertisers, and the public in general. *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990). Thus, all communications concerning working conditions are protected so long as they are not so disloyal, reckless, or maliciously untrue as to lose the Act's protection. *Endicott Interconnect Technologies*, 345 NLRB 409 (2005). "In determining whether a challenged rule is lawful, we will give the rule a reasonable reading. That is, we will refrain from reading particular phrases in isolation or presuming improper interference with employee rights." *Guardsmark, LLC*, 344 NLRB 809 (2005).

The General Counsel maintains that the following handbook rule is overly broad and vague, and encroaches on employees' Section 7 rights to communicate with the public and with guests concerning working conditions: "Under no circumstances should staffmembers solicit guests, including requests for autographs, soliciting employment and other non-resort matters." In advancing its contention, the General Counsel omits the concluding phrase of the prohibition. However, by parsing the prohibition's wording and omitting the concluding phrase, the General Counsel contravenes the Board's instruction to refrain from reading phrases in isolation.

The initial part of the prohibition, "under no circumstances should staffmembers solicit guests," is problematic, and, in isolation, would appear to encroach on employees' Section 7

rights. However, the prohibition must be read with its modifying phrase, which identifies the particular solicitations that are being prohibited. Thus, the types of solicitations being proscribed are autographs, requests for employment, and other nonresort matters. Employees would not reasonably conclude that the prohibition includes protected, Section 7 matters.

Accordingly, the rule on page 32 of the handbook does not unlawfully tend to chill employees in the exercise of their Section 7 rights.

The Respondents also maintain a rule that provides:

Being present at guest functions or in guest rooms, including sleeping rooms, restaurant, lounges, meeting rooms, or recreation facilities without authorization. No unauthorized social contact will be permitted at any time with guests.

Again, the General Counsel challenges the validity of the rule by citing a portion of the rule. Nevertheless, the question is close because the unabridged sentence prohibits social contact without qualification. See *Cintas Corp.*, 344 NLRB 943 (2005) (“We agree with the judge that the rule’s unqualified prohibition of the release of ‘any information’ regarding ‘its partners’ could be reasonably construed by employees to restrict discussion of wages and other terms and conditions of employment.”). However, the charged sentence is preceded by examples that would reasonably be read to explain what is meant by “social contact.” The examples include being present at guest functions or in guest rooms, including sleeping rooms, restaurant, and lounges. In light of these examples, “employees would reasonably understand the rule to prohibit only personal entanglements, rather than activity protected by the Act.” *Guardsmark, LLC*, supra at 811. Although the question is not free from doubt, I conclude that the General Counsel has not satisfied his burden of proving that the cited rule would reasonably be read to include and infringe on employees’ Section 7 rights.

2. Handbook, pages 37–38. “The governing principle is that a rule is presumptively invalid if it prohibits solicitation on the employees’ own time.” *Our Way, Inc.*, 268 NLRB 394 (1983). Moreover, rules banning solicitation during working time must “state with sufficient clarity that employees may solicit on their own time.” Id. at 395.

The Respondents’ handbook provides that “solicitation of any kind of one staffmember by another is prohibited while either person is on working time or in a public or work area.” Therefore, employees are prohibited, among other things, from seeking mutual aid from one another concerning their working conditions. The prohibition makes no distinction between public or work areas in the resort. The Respondents have offered no business justification for their maintenance of this rule. (Indeed, the Respondents have offered no business justification(s) for any of their employee rules. See R. Br. 218–219.) The rule infringes on employees’ Section 7 rights and is unlawful under Section 8(a)(1) of the Act.

3. Handbook, page 38. Although an employer may lawfully prohibit employee distribution of literature in work areas at all times, it may not prohibit distribution during nonworking time and in nonworking areas. *Hale Nani Rehabilitation & Nursing*,

326 NLRB 335 (1998); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 621 (1962).

The Respondents’ handbook provides that “[d]istribution by staffmembers of advertising materials, handbills, printed or written literature of any kind in working or public areas of our Resort is prohibited at all times.” Therefore, employees are prohibited from distributing union literature during nonworking time and in nonworking areas. Accordingly, the prohibition violates Section 8(a)(1) of the Act.

4. Handbook, page 33. Any ambiguity in the Respondents’ rules must be construed against them as the promulgators of the rules. *Lafayette Park Hotel*, 326 NLRB at 828. Also, an overly broad or vague rule that encroaches in employees’ Section 7 rights is unlawful. Id. Employer rules that require employees to obtain approval before engaging in protected activity are unlawful.

The Respondents maintain the following rule: “Should a staff member wish to visit the Resort with family or friends, they may do so with the prior approval of their manager and Planning Committee Member. You will be required to have a ‘Return to Property’ pass.” The General Counsel contends that this rule violates Section 8(a)(1) of the Act. I agree.

In *Lafayette Park Hotel*, 326 NLRB at 827, the Board held that the following rule did not implicate Section 7 activity: “Employees are not permitted to use the restaurant or cocktail lounge for entertaining friends or guests without the approval of the department manager.” The lawful rule in *Lafayette Park Hotel* limited the area of the hotel to which it applied (the restaurant and cocktail lounge) and limited the employee activities to which it applied (entertaining friends or guests). The present rule contains neither of these limitations. It applies indiscriminately to the “Resort,” and it is not limited to any particular purpose, such as entertainment. Thus, under the present rule, employees are not permitted to visit any part of the resort with family or friends without prior approval and without securing a “Return to Property” pass.

The *Lafayette Park Hotel* rule limited its reach to the entertainment of friends or guests, and it corroborated that intent by limiting its application to the hotel restaurant and cocktail lounge. Accordingly, the Board found that “a reasonable employee would not interpret this rule as requiring prior approval for Section 7 activity.” Id. However, the present rule is not limited in its application or intent. Moreover, the Respondents have offered no business justification or explanation for the rule. The present rule prohibits any visit to Turtle Bay by an employee with family or friends, not just visits for entertainment, and it prohibits visits by such employees to the entire resort, not just particular parts of the resort. A reasonable employee could interpret this rule as requiring prior approval for Section 7 activity.

A rule that “requires employees to secure permission from their employer prior to engaging in protected concerted activities on an employee’s free time and in nonwork areas is unlawful. *Teletech Holdings, Inc.*, 333 NLRB 402, 403 (2001). Accordingly, the Respondents’ access rule is unlawful.

“Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.” *Tri-*

*County Medical Center*, 222 NLRB 1089 (1976). The present rule denies off-duty employees entry to the resorts' parking lots and other outside nonworking areas, and the Respondents have offered no business reasons that would justify the rule. Accordingly, this rule violates Section 8(a)(1) of the Act.

5. Handbook, pages 40–41; rules and regulations, page 2.

(a) An employer's rule denying off-duty employees access to the employer's premises is presumptively valid only if, among other things, it limits access solely with respect to the interior of the plant or facility. *Tri-County Medical Center*, supra. A rule that prohibits an employee from reporting to or staying on the employer's property 30 minutes before or after the employee's shift is unlawful. *Ark Las Vegas Restaurant*, 335 NLRB 1284 (2001), remanded 334 F.3d 99 (D.C. Cir. 2003), after remand 343 NLRB 1281 (2004). Similarly, an employer's rule that prohibits employees from patronizing the employer's property is unlawful. *Flamingo Hilton*, 330 NLRB 287 (1999). The Respondents' handbook rule prohibits employees' "[p]resence in the Resort more than 30 minutes before or after your shift." Accordingly, this rule unlawfully restricts employees' Section 7 rights, and violates Section 8(a)(1) of the Act.

(b) The Respondents' also maintain a rule in their rules and regulations, which provides that "[b]eing present on company premises at any time other than the employee's assigned work shift, unless specifically authorized by his/her supervisor or picking up paycheck" is misconduct, which could result in disciplinary action, including termination. Although this rule uses the term "premises," the previous rule used the term "property," and other rules use the term "Resort," there does not appear to be any distinction in the terms, either as used by the Respondents or in general. See *Teletech Holdings, Inc.*, 333 NLRB at 404 (a rule prohibiting presence on the employer's "premises" while off duty was found to include parking lots, gates, and other outside nonworking areas); *Ark Las Vegas Restaurant*, 343 NLRB at 1283–1284 (where the employer interchanged the terms premises and property, and the Board relied on the judge's finding that the word "property" in the hotel industry generally refers to the entire hotel, outside grounds, and parking lot complex).

This no-access rule infringes on employees' Section 7 rights to a greater extent than the previously considered 30-minute rule. This rule in the Respondents' rules and regulations unlawfully restricts employees' Section 7 rights, and violates Section 8(a)(1) of the Act.

(c) An employer's rule that prohibits employees from walking off the job is overbroad and in violation of the Act. *Labor Ready, Inc.*, 331 NLRB 1656 (2000). The Respondents' rule provides that "[w]alking off the job will be considered voluntary termination." Accordingly, the Respondents' rule is overbroad and in violation of the Act.

(d) In *Grandview Health Care Center*, 332 NLRB 347, 349 (2000), the Board stated:

By compelling employees to cooperate in unfair labor practice investigations, or risk discipline, the Respondent's rule violates the longstanding principle, established in *Johnnie's Poultry*, that employees may not be subjected to employer interro-

gations, relating to Section 7 activity, that reasonably tend to coerce them to make statements adverse to their Section 7 interests, those of a fellow employee, or those of their union. If the employees' Section 7 right of mutual protection is to be safeguarded, cooperation must be voluntary. Failure to inform employees of the voluntary nature of the employer's investigation is 'a clear violation of Section 8(a)(1) of the Act.

The Respondents' rule provides that a violation of Turtle Bay policies includes "[r]efusing to cooperate during a company investigation." There is no evidence in the present record that the Respondents informed Turtle Bay's employees that their cooperation in such investigations was voluntary. The Respondents' rule violates Section 8(a)(1) of the Act.

The Respondents have not addressed the substance or the merits of their foregoing rules. However, the Respondents make two contentions. First, the rules were promulgated more than 6 months prior to the filing of the charges in the present case. Accordingly, the Respondents contend that the present charges are timebarred under Section 10(b) of the Act. Second, the Respondents contend that the charges should be dismissed because the violations, if any, are de minimus.

The Respondents' timeliness argument confuses promulgating an unlawful rule with maintaining an unlawful rule. Both of these actions are distinct, both may be unlawful, and, if so, both would involve illegal actions that occur at different times. An employer may violate the Act by promulgating an unlawful rule, for which the violation would generally occur on the date the rule is promulgated. On the other hand, an employer may also violate the Act by maintaining an unlawful rule, and that violation continues throughout the period the unlawful rule is maintained. See, e.g., *Lafayette Park Hotel*, 326 NLRB at 825. To accept the Respondents' argument would render the Board powerless to remedy the Respondents' unlawful work rules that continue to coerce employees in the exercise of their protected rights, effectively granting the Respondents a license to violate the Act. See *Alamo Cement Co.*, 277 NLRB 1031, 1037 (1985).

The complaint charges that the Respondents promulgated and maintained unlawful rules. The Respondents' have been found to have unlawfully maintained those rules, not to have unlawfully promulgated those rules. Section 10(b) may insulate the Respondents' promulgation of their unlawful rules, but the maintenance of those rules within 6 months of the filing of the charges in this case renders the present action timely.

The Respondents also contend that there is no evidence they have imposed discipline under the rules at issue, and accordingly, any violation of the Act from the maintenance of those rules is de minimus. However, "[i]t is axiomatic that merely maintaining an overly broad rule violates the Act." *Grandview Health Care Center*, 332 NLRB at 349. "Evidence of enforcement of the rule is not required to find a violation of the Act. Indeed, the mere maintenance of an ambiguous or overly broad rule tends to inhibit or threaten employees who desire to engage in legally protected activity but refrain from doing so rather than risk discipline." *Id.* (citations omitted). Accordingly, the Respondents' de minimus argument is rejected.

*C. Restricting the Union's Access to Turtle Bay and Prohibiting the Collection of Dues—Complaint Paragraphs 11, 12, 16, 17, 18, 21, and 22*

In *Frontier Hotel & Casino*, 309 NLRB 761 (1992), enfd. sub nom. *NLRB v. Unbelievable, Inc.*, 71 F.3d 1434 (9th Cir. 1995), Frontier and the union had negotiated a union access provision similar to the access provision in the present case. Notwithstanding, Frontier asserted the right to permanently expel any union representative who exceeded what Frontier believed were the bounds of the access provision. The contract agreement in *Frontier Hotel & Casino* permitted union representatives to visit Frontier's property "to see that this Agreement is being enforced and to collect union dues, assessments and initiation fees, provided that such visits by Union representatives shall not interfere with the conduct of the Employer's business or with the performance of work by employees during their working hours." Id. at 768. By specifically listing the allowed purposes for the Union's visits to the hotel, the access provision in *Frontier Hotel & Casino* is, if anything, more restrictive than the access provision in the present case.

Frontier expelled three union representatives who, Frontier claimed, had engaged in improper conduct exceeding the bounds of the negotiated access provision. The Board affirmed the judge's finding and ruling that *Frontier* had no or flimsy grounds on which to expel the union representatives, leading to the inference that they were expelled to inhibit the union from communicating with its membership, in violation of Section 8(a)(1). The Board also affirmed the judge's finding and ruling that one or more of the expulsions were done in the presence of employees, warranting the conclusion that such expulsions had interfered with union-related communications or coerced and restrained employees who were engaging in union activity, in violation of Section 8(a)(1). The Board also affirmed the judge's conclusion and ruling that the expulsions deprived employees of their contractually granted access to their bargaining representative, the expulsions constituted a unilateral change of a material term or condition of employment, and the expulsions tended to interfere with the representational process, in violation of Section 8(a)(5). Id. at 766; see also *ATC/Vancom of California, L.P.*, 338 NLRB 1166, 1169 (2003); *West Lawrence Care Center*, 308 NLRB 1011 (1992).

On February 14 and 18, May 4 and 24, June 2, 7, 11, 12, 15, 17, and 22, 2004, January 27, and March 5, 2005, the Respondents told union representatives, who were performing their duties at Turtle Bay, that the union representatives were trespassing and/or that the union representatives had no right to be at Turtle Bay. On each of these occasions, the Respondents sought the assistance of Honolulu police officers to evict union representatives from the resort's grounds. On May 24, the union representatives' duties included the collection of dues. On May 6, Ramos told the Union that the Union could not collect dues on the resort's grounds.

The union access provision of the collective-bargaining agreement does not restrict where union representatives may go in the resort. It sets forth the reason union representatives are granted access, which is "to carry on their duties," but the term "duties" is not defined or otherwise limited. See *Gilliam Candy Co.*, 282 NLRB 624 (1987) (an access provision that permitted

the union representative to enter the plant "on business," but did not otherwise define or qualify the term, was interpreted broadly, or, at least, at face value, to include a visit to investigate the circulation of a decertification petition, a visit to talk to employees, and a visit to serve internal union charges on an employee). There are two qualifications in the access provision: (1) the union representatives must first notify the resort when they arrive,<sup>7</sup> and (2) "there shall be no interference with the normal conduct of business." To clarify, the access provision does not proscribe any and every interference with business, only interference with the "normal conduct of business."

There is no credible evidence that Marsh or other union representatives caused any interference with the Respondents' normal conduct of business on February 14 and 18, May 24, June 2, 7, 12, 15, 17, and 22, 2004. On each occasion, by telling the union representatives that they were trespassing, by issuing and handing trespass notices to the union representatives, and/or by evicting the union representatives from Turtle Bay, the Respondents interfered with and restrained the Union in communicating with its membership. Like the Respondents' summoning the police, their issuance of trespass warnings and notices sought to criminalize the actions of the union representatives in coming to Turtle Bay, despite the fact that the union representatives came to Turtle Bay pursuant to the access provision in the contract and in order to perform their duties. The union representatives did not violate the access provision in the contract. The Respondents had no or flimsy grounds on which to issue such warnings and notices. Likewise, the Respondents' actions reasonably tended to interfere with, restrain, and coerce Turtle Bay's employees in the exercise of their rights under Section 7 of the Act. Thus, as in *Frontier Hotel & Casino*, supra, the Respondents' conduct either had the indirect impact on employees of interfering with union-related communications or directly coerced and restrained employees who were engaging in the union activity of conversing with their bargaining representative. Accordingly, on each occasion, the Respondents violated Section 8(a)(1) of the Act.

On February 14 and 18, May 4 and 24, June 2, 7, 11, 12, 15, 17, and 22, 2004, and January 27, 2005, the Respondents called the Honolulu police department to assist in evicting the union representatives from the resort property. After the police arrived at the resort, they assisted in evicting the union representatives and served as witnesses to the Respondents' issuance of trespass notices to the union representatives. All of these police confrontations were done in the presence of employees. The Respondents failed to provide a credible explanation why it was necessary to call the police. Accordingly, like *Frontier Hotel & Casino*, Turtle Bay had no or, at best flimsy, grounds on which to solicit the police to aid the Respondents in evicting the union representatives.

Moreover, in spite of the police being called on many occasions, and in spite of the Respondents' issuance of numerous trespass notices to Marsh and Shimabukuro, there is no evi-

<sup>7</sup> The phrase "when they arrive" is not spelled out in the provision. However, the parties have not disputed, and have operated with the understanding, that it means the union representatives must sign the register at the security dispatch office when they come into the hotel.



dence that the Respondents ever pursued the “trespasses” any further in the criminal process, such as asking the district attorney to issue arrest warrants or to prosecute the cases. This failure by the Respondents shows that, in soliciting the police, they were not motivated to assert their private property rights under Hawaii’s criminal trespass statute. Rather, the Respondents’ motivation in bringing the police onto their grounds was to use the police to intimidate the Union and its membership, and to imply, if not assert, that a union representative performing his or her duties at the resort was committing a criminal act. Summoning the police on these occasions reasonably tended to interfere with, restrain, and coerce Turtle Bay’s employees in the exercise of their rights under Section 7 of the Act. *Fabric Warehouse*, 294 NLRB 189 (1989), *enfd. sub nom. Hancock Fabrics v. NLRB*, 902 F.2d 28 (4th Cir. 1990); *Jerry Cardullo Ironworks, Inc.*, 340 NLRB 515 (2003). Accordingly, on each occasion the Respondents summoned the police to assist the Respondents in intimidating, evicting, interfering with, and restraining a union representative, they violated Section 8(a)(1) of the Act.

The foregoing violations occurred without regard to whether the union representatives had caused disturbances or disruptions in the workplace. The remaining question is whether such actions by the Respondents are permitted when the union representative does disturb workers in the workplace. On August 6, Santa Maria disturbed the kitchen workers by talking to them for about 15–20 seconds on union-related matters as he was going through the kitchens. The Respondents reacted by calling the police and evicting Santa Maria from Turtle Bay.

Because Santa Maria was disturbing the workers as he walked through the work areas of the hotel, the Respondents had a reasonable basis to stop him. However, the Respondents summoned the police before the standoff with Santa Maria in the kitchen, which tends to show their reflexive predisposition to solicit the police whether or not the police were needed. Nevertheless, the evidence fails to demonstrate whether the Respondents violated Section 8(a)(1) in using the police to evict Santa Maria from the resort. There is no evidence that Dougher and Santa Maria seriously discussed the possibility of Santa Maria continuing his walk through the work areas of the hotel without disturbing the workers. Santa Maria and Dougher stubbornly adhered to their respective positions. Dougher could have offered Santa Maria the opportunity to walk through the remaining work areas of the hotel without disturbing the workers. Alternatively, Santa Maria could have acceded to Dougher’s prohibition of entering the lobby area without the necessity of waiting for the police. Whether stopping Santa Maria from proceeding through the work areas of the hotel and summoning the police unlawfully interfered with employees’ rights on this occasion was not fully developed, likely because the General Counsel maintains that Santa Maria was not disturbing the workers. Accordingly, I will recommend that this charge (complaint par. 18) be dismissed.

An employer violates Section 8(a)(1) and (5) of the Act when, during the course of a collective-bargaining relationship, it alters established matters that are mandatory subjects of bargaining without giving the union prior notice and an opportunity to bargain regarding the change. *NLRB v. Katz*, 369 U.S.

736 (1962). A union access provision in a collective-bargaining agreement is a term and condition of employment that survives the agreement’s expiration. *TLC St. Petersburg, Inc.*, 307 NLRB 605 (1992), *enfd. mem.* 985 F.2d 579 (11th Cir. 1993); *Unbelievable, Inc. v. NLRB*, 71 F.3d at 1438. Union access to the employer’s premises is a mandatory subject of bargaining, which requires notice to the union and an opportunity to bargain prior to any change. *Id.*; *American Commercial Lines*, 291 NLRB 1066, 1072 (1988). An employer violates Section 8(a)(5) and (1) of the Act by unilaterally and without notice making a material, substantial, and significant change in a contractual access provision. *Fabric Warehouse*, 294 NLRB at 192; *Peerless Food Products*, 236 NLRB 161 (1978). “A change is measured by the extent to which it departs from the existing terms and conditions affecting employees.” *Southern California Edison Co.*, 284 NLRB 1205 *fn.* 1 (1987), *enfd. mem.* 852 F.2d 572 (9th Cir. 1988).

On February 12, 2004, the Respondents began to interfere with the Union’s access to the resort and to the employees. This change represented a significant change from the Respondents’ previous practice and from the access provisions of the collective-bargaining agreement. Beginning in February 2004, the Respondents interfered with the Union’s access to the resort and to the employees by issuing warnings and notices of trespass, bringing the police onto the property to help the Respondents intimidate and evict the Union, and evicting the union representatives. These actions were done on February 14 and 18, May 4 and 24, June 2, 7, 11, 12, 15, 17, and 22, 2004, and January 27, 2005. These unilateral actions were a material, substantial, and significant change in the contractual access provision, and the changes were made without notifying or bargaining with the Union.

In evicting the union representatives, and interfering with the Union’s access to the resort property and its members, the Respondents deprived employees of their contractually granted access to their bargaining representative. In addition, the evictions and interference constituted a unilateral change of a material term or condition of employment, and the actions tended to interfere with the representational process. *Frontier Hotel & Casino*, 309 NLRB at 766. Accordingly, on February 14 and 18, May 4 and 24, June 2, 7, 11, 12, 15, 17, and 22, 2004, and January 27, 2005, by materially, substantially, and significantly changing and interfering with the Union’s access to Turtle Bay, the Respondents violated Section 8(a)(5) and (1) of the Act.

The Respondents argue that “the overriding issue in the matter at hand [is]: TBR has the right to refuse to allow non-employee Union agents access to its private property, and to not allow non-employees to roam at will all over its private property *because* the Union agents are allowed reasonable ‘non-trespassory means to communicate their message.’” (R. Br. 206–207; *emphasis in original*.) Without regard to the hyperbole, this statement does not identify the issue in the present matter, overriding or not. The issue is whether the Respondents unilaterally changed the contractual access provision that governs its relations with the Union, and if so, whether the Respondents’ actions are lawful.

The Respondents cite *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), and *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956),

for the proposition that an employer may lawfully restrict non-employees, such as union representatives, from accessing the employer's property. However, the present issue is not whether, in a vacuum, the Respondents could lawfully deny access to a union representative. In the present case, there is a preexisting agreement that authorizes union access to the Turtle Bay Resort. Accordingly, the question is whether the Respondents may lawfully and unilaterally restrict union access to Turtle Bay in derogation of the agreement.

The Respondents also argue that the Union violated the agreement by causing disruptions at Turtle Bay. For example, the Respondents cite the Union's rally on March 25, 2004, as an important, precipitating event that caused Turtle Bay to restrict the Union's subsequent access to the resort. But, even if the rally members unlawfully trespassed on the Respondents' property on March 25—although it should be noted that a police officer was present in the hotel's lobby and witnessed the rally, yet made no arrests and did nothing to stop the rally as it went through the lobby—the rally was not related to the contractual access provision. Indeed, Marsh was present in the employee cafeteria on the day of the rally, but she did not participate in the rally, and there is no evidence that she had any involvement with the rally.

In determining whether the Respondents have a proper claim that the Union interfered with Turtle Bay's normal conduct of business, the initial factual inquiry is, what were the union representatives doing at the time and on the day they were issued trespass notices and the police were summoned to evict them from the property. On the days the police were summoned to Turtle Bay, and on the days that Marsh or Shimabukuro were issued trespass notices, the union representatives had not interfered with Turtle Bay's business, let alone its normal conduct of business. There is no credible evidence that the union representatives caused disruptions or interfered with business on these days. Going further, there is no credible evidence that Marsh ever engaged in conduct that caused disruptions or interfered with the normal conduct of business of Turtle Bay. And, the only evidence of Shimabukuro engaging in such conduct is her participation in the demonstration on March 25, a demonstration that had no connection with the contractual access provision.

Rowena Afoa, Roger Corpuz, Tiffany Martines, and Kaleo Delosantos testified to occurrences that the Respondents claim showed disruptions caused by the union representatives. Each of these witnesses displayed such a bias and animosity toward the Union that their testimonies are not credible. Moreover, even if credible, the events described by these biased witnesses does not arise to disruptions or interference with the normal conduct of business. For example, Afoa described an event on July 1, 2004, in which an employee reported a confrontation with Marsh. Afoa is a reservations supervisor. (Afoa has resigned from the Union, she has composed or distributed anti-union flyers at Turtle Bay more than 10 times, and she has even sought in state court a TRO against Marsh.) Afoa went to the cafeteria and confronted Marsh, who denied that anything had occurred. At one point, Marsh said that Afoa was crazy for making such an accusation. Afoa then went to human resources to fill out a report while the security department summoned the

police. The enormity of this reaction says more about Afoa's antiunion animus than it does about any supposed disruption caused by Marsh.

In November 2004, Delosantos was sitting in the cafeteria with Tiffany Martines and another friend. Marsh came to their table and sat down, but Delosantos and Martines did not want Marsh to be there. An argument ensued, although it is not clear who started the argument or who was the aggressor. Delosantos was quite emotional when she testified, and her bias against the union was transparent. Moreover, an argument in the employee cafeteria, which is where employees go on their breaks, does not constitute a disruption in the workplace because Martines and her friend were on their break.

Roger Corpuz is the bell captain. Corpuz resigned from the Union, he helped to start the petition at Turtle Bay in opposition to the boycott, and he has been allowed by the Respondents to speak at new employee orientations. Corpuz described an encounter with Kerwin in the cafeteria, an event, even if Corpuz is believed, that did not involve disruptions in the workplace. On balance, Afoa, Martines, Delosantos, and Corpuz show that there were at least some employees who did not support the Union and who did not want to be "bothered" by Marsh in the employee cafeteria.

The Respondents contend that Marsh violated the agreement by walking through the hotel, as she did, to advise the employees she was there. However, the contractual access provision does not support this contention nor is there any evidence that Marsh's practice was contrary to the Union's historical practice under the contractual access provision. Moreover, going through the hotel when she first arrived in order to greet the employees had long been Marsh's practice, and the Respondents had never prevented her from doing this or voiced an objection. In addition, when Marsh was given trespass notices, and when the police confronted her and told her to leave, neither the police nor the Respondents said to Marsh that she had violated the agreement by walking through the working areas and greeting employees.

The Respondents also contend that the trespass notices issued to Marsh and Shimabukuro on May 4 were based on their actions in the March 25 rally. However, Marsh did not participate in that rally, so this contention is rejected. Also, on May 4, the retirees chanted as they walked through the lobby and back to their bus. But, Marsh was not part of the group that chanted, nor was she a part of the outing. Marsh was at Turtle Bay on May 4 as part of her regular duties at the resort. The retiree group outing had nothing to do with the contractual access provision. On balance, and except for minor, insignificant instances,<sup>8</sup> the Union did not breach the access provision of the agreement.

<sup>8</sup> For example, on January 27, 2005, Marsh first went to the lobby of the hotel rather than the security dispatch office. However, the reason Marsh intended to go to the cafeteria via the lobby was because of debilitating back pain, which prevented her from being able to climb the outside steps leading to the security dispatch office. Her intent had been to use the elevator in the lobby to go to the cafeteria. The Respondents' treatment of Marsh on January 27 displayed more than their antiunion animus, although it is unnecessary to characterize additional aspects of that treatment.

Collecting dues from members is one of the duties of the Union, and the Respondents do not contend otherwise. Accordingly, collecting dues by the Union is within the union access provision that contractually bound the Respondents. On May 6, 2004, Ramos notified the Union that the Union was no longer allowed to collect dues at Turtle Bay. On May 24, the Respondents prevented the Union from collecting dues at Turtle Bay, and summoned the police to evict the union representatives. Preventing the Union from collecting dues at Turtle Bay was a material, substantial, and significant change and interference with the Union's access to Turtle Bay. The Respondents unilaterally imposed this change and this restriction on the Union. By doing so, the Respondents violated Section 8(a)(5) and (1) of the Act.

In *Venetian Casino Resort, LLC*, 345 NLRB 1061 (2005), the union demonstrated on the sidewalk in front of the hotel and casino. The employer summoned the police and took other actions to interfere with the demonstration. The courts later determined that the sidewalk was a public forum. The Board affirmed the administrative law judge's determination that because the sidewalk was a public forum, and because the union demonstrators were engaged in protected activity, the employer violated Section 8(a)(1) by summoning the police and interfering with the demonstration.

On February 12, 2004, the Respondents blocked a rally, consisting of outside union supporters and employees of the resort, from going onto the Bay View Beach. The supporters and employees had attempted to conduct a rally on the Kawela Beach, but after a confrontation with members of a wedding party, and after Dougher had talked to Marsh about the rally, the group left that beach and started walking toward the Bay View Beach. Both beaches are public beaches. Once the group was in the parking lot and walking toward the Bay View Beach, the Respondents stopped them from going onto the beach. The Respondents also called the police, who arrived and threatened the rally members with arrest if they did not disburse.

The rally on the beach at Turtle Bay consisted of demonstrating support for the Union in its ongoing contract negotiations with the Respondents. Accordingly, the demonstrators were engaged in protected activity. They were conducting this protected activity on public grounds. The Respondents summoned the police to evict the demonstrators, and the Respondents otherwise interfered with the demonstrators. Accordingly, the Respondents violated Section 8(a)(1) of the Act.

The Respondents contend that the demonstrators engaged in boisterous conduct on the Kawela Beach, and it is likely that the chanting on the beach was heard in the hotel's pool area where a wedding ceremony was taking place. This likelihood is increased by the fact that two demonstrators were using bullhorns at the demonstration. However, the demonstrators agreed to move the rally from the Kawela Beach and onto the Bay View Beach, and they attempted to do so. Moreover, the demonstrators were not threatened with arrest while they were on the Kawela Beach, and neither the police nor the Respondents told the demonstrators that they were making excessive noise. The Respondents make no contention that a rally on the Bay View Beach would have disturbed anyone. The Respondents violated the demonstrators' Section 7 rights by preventing them

from going to the Bay View Beach, and then removing them from the resort grounds with the assistance of the police.

In their posthearing brief, the Respondents do not address the charges in the complaint concerning the Respondents' actions on February 12. Rather, the Respondents claim that they did not engage in unlawful surveillance of the demonstrators on February 12. (R. Br. 193.) But, the complaint does not allege that unlawful surveillance occurred on February 12. Accordingly, and considering all the circumstances, I conclude that the Respondents no longer dispute that they unlawfully interfered with the demonstrators on February 12, other than by surveillance. In any event, and without regard to a waiver or concession by the Respondents, their actions on February 12 in summoning the police, preventing the demonstrators from going onto a public beach, and evicting the demonstrators, as discussed and explained above, violate Section 8(a)(1) of the Act.

*D. Surveillance—Complaint Paragraphs 13, 14, 15, 19, and 20*

In *National Steel & Shipbuilding Co.*, 324 NLRB 499 (1997), enfd. 156 F.3d 1268 (D.C. Cir. 1998), the Board set forth the principles applicable to charges of surveillance:

[T]he fundamental principles governing employer surveillance of protected employee activity are set forth in *F. W. Woolworth Co.*, 310 NLRB 1197 (1993). The Board in *Woolworth* reaffirmed the principle that an employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance. Photographing and videotaping such activity clearly constitute more than mere observation, however, because such pictorial record-keeping tends to create fear among employees of future reprisals. The Board in *Woolworth* reaffirmed the principle that photographing in the mere belief that something might happen does not justify the employer's conduct when balanced against the tendency of that conduct to interfere with employees' right to engage in concerted activity. Rather, the Board requires an employer engaging in such photographing or videotaping to demonstrate that it had a reasonable basis to have anticipated misconduct by the employees. "[T]he Board may properly require a company to provide a solid justification for its resort to anticipatory photographing." [Citations omitted.]

On March 25, 2004, security guards were posted at the entrance to Turtle Bay, and they held video cameras that they pointed toward the group of union supporters and employees as the group met in front of the resort and as the group entered the resort grounds. There had been no threats of violence or indications of violence from the group. Moreover, there was no history or experience of violence with union rallies. The Respondents assert that the union rally on February 12 had trespassed on the resort's property, but this is not true. On February 12, the demonstrators accessed the beach as all members of the public are permitted to do, and they remained on the public beach throughout the rally. The Respondents have not demonstrated a reasonable basis to anticipate misconduct from the rally participants nor have the Respondents provided a solid justification for its videotaping of the demonstrators before and as they en-

tered the resort grounds. Accordingly, the Respondents violated Section 8(a)(1) of the Act when they videotaped the rally participants on March 25 as the demonstrators gathered in front of Turtle Bay and entered the resort grounds.

The General Counsel contends that Dougher unlawfully engaged in videotaping the March 25 rally participants while they were demonstrating on the Kawela Beach. (GC Br. 91–92; GC Exh. 51.) However, the complaint does not allege this event. (See complaint par. 13.) Moreover, the nonemployee members of the rally had marched through the hotel's lobby on their way to the beach, and, after those demonstrators had gathered on the beach, the Respondents arguably had some justification for videotaping. Because the complaint does not charge the Respondents with unlawful surveillance by videotaping the demonstrators on the Kawela Beach, Dougher's apparent videotaping of the group on the beach will not be considered.

On April 2, Dougher appeared to videotape rally participants, most of whom were employees, as they demonstrated across Kamehameha Highway in front of Turtle Bay. Other security guards were observing the rally, and they were seated in golf carts at the entrance to the resort. The rally was peaceful and the Respondents have not demonstrated a reasonable basis to anticipate misconduct from the rally participants nor have the Respondents provided a solid justification for its videotaping of the demonstrators before and as they entered the resort grounds.

On April 17, approximately 80 people, about half of whom were employees of the resort, participated in a rally at the resort. A security guard, identified as Val, took pictures of the license plates on the rally participants' vehicles. While the rally was taking place on the beach, a security guard, identified as Michael, was pointing a video camera at the group as if he were videotaping the rally. In addition, Tom Parks, a sales manager for the resort, held a video camera and pointed it at the group as if he were videotaping them. The rally was peaceful and the Respondents have not demonstrated a reasonable basis to anticipate misconduct from the rally participants nor have the Respondents provided a solid justification for its videotaping of the demonstrators before and as they entered the resort grounds.

The Respondents have not demonstrated a reasonable basis to anticipate misconduct from the rally participants on April 2 and 17, nor have the Respondents provided a solid justification for its videotaping of the rally participants. Accordingly, the Respondents violated Section 8(a)(1) of the Act when they videotaped the rally participants and took pictures of their license plates on April 2 and 17.

The Respondents argue that the testimony offered by the General Counsel's witnesses on the April 2 and 17 rallies was "a jumble of testimony in which its witnesses failed to distinguish its surveillance charges and failed to show that TBR engaged in any illegal surveillance." (R. Br. 202.) This argument is rejected. The credible, virtually unimpeached, evidence demonstrates that the Respondents videotaped, or appeared to videotape, the rallies.<sup>9</sup> Under all of the circumstances, these

actions constitute unlawful surveillance in violation of Section 8(a)(1).

The Respondents contend that the five factors listed by Member Brame in his concurring opinion in *Randell Warehouse of Arizona*, 328 NLRB 1034, 1047–1048 (1999), should be considered in determining whether the circumstances surrounding the Respondents' apparent videotaping on April 2 and 17 are coercive. These factors are:

(1) Whether the photographing occurred in the context of serious independent unfair labor practice conduct or unalleged threats of physical or economic reprisal, intimidation, or actual violence.

(2) Whether the activity photographed was carried on in an open and public way, including whether the activity involved trespass.

(3) Whether the photographing took place at the employer's premises, at the union hall or a union-sponsored event, or at a location unconnected with either party.

(4) Whether the photographing was done in a "conspicuous" manner that would suggest it was intended as a prelude to reprisal.

(5) Whether the party photographing the activity had a "legitimate" or "proper" justification as previously recognized by the Board.

The videotaping by the Respondents occurred in the context of serious independent unfair labor practices. The activity videotaped was carried on in an open and public way. The videotaping took place while the demonstrators were both on and off the Employer's premises. The videotaping was done in a conspicuous manner. The Respondents did not have a legitimate or proper justification for the videotaping or for appearing to videotape. Accordingly, the five *Randell* factors demonstrate, or are at least consistent with, the coerciveness of the Respondents' apparent videotaping on April 2 and 17.

The Respondents were diligent at the hearing in objecting to and clarifying that the General Counsel's witnesses could not definitely say that they were being videotaped, only that Dougher and the security guards and Parks were holding videotape cameras and pointing it at the groups on the two dates, as if they were videotaping the demonstrators. The Respondents have not admitted that they actually videotaped the demonstrators nor have their witnesses admitted videotaping. This position, that the Respondents only appeared to videotape the demonstrators, undercuts any claim the Respondents might have that they were justified in videotaping the demonstrators. That is, a claim that one is justified in videotaping an event might authorize the actual videotaping, but not simply the appearance of videotaping.

On June 11, security guard Hanohano followed Marsh wherever she went in the resort, including the employee cafeteria. No reasonable basis was provided for this following of Marsh. Accordingly, the Respondents violated Section 8(a)(1) of the

<sup>9</sup> Despite the occasions noted herein that Dougher and other security guards and managers held video cameras toward union members who were demonstrating and appeared to videotape the demonstrations, the Respondents produced no videotapes in response to subpoenas from the

General Counsel. The only videotape that was offered and received in evidence in this proceeding was a tape that the Union produced to the Respondents in response to a subpoena. R. Exh. 52. This is a tape that a union employee made of the rally as it proceeded through the hotel's lobby on March 25.

Act when security guard Hanohano followed Marsh and followed her into the employee cafeteria as she talked to employees.

The Respondents continued to follow Marsh whenever she came to Turtle Bay. The Respondents contend that “[t]his ‘following’ is not based on the ‘mere suspicion’ that something might occur, but is the logical expectation that is solely based on the Union agents’ recurring, disruptive behavior. It is justified so that TBR employees will not be disrupted from their work; justified so that guests will not be intimidated or interfered with; and justified so that the TBR can maintain the safety and security of the premises.” (R. Br. 203–204.) This argument is rejected, factually and legally, both for the Respondents’ following of Marsh on June 11 and for the Respondents’ following of Marsh and other union representatives thereafter.

The test is whether employees would reasonably assume from the employer’s conduct that their protected activities have been placed under surveillance. *United Charter Service*, 306 NLRB 150 (1992). The security guards’ following of Marsh is “activity [that] clearly constitute[s] more than mere observation.” *F. W. Woolworth Co.*, 310 NLRB at 1197. The security guards closely followed Marsh, often within 2 to 3 feet, and sat at tables in the cafeteria close to Marsh as she conversed with employees. Such activity would likely and reasonably inhibit employees from talking to Marsh, and would instill fear in employees if they did talk to Marsh. Accordingly, the Respondents violated Section 8(a)(1) of the Act.

The Respondents’ followed Harmon at the resort just as they had followed Marsh. On February 10, 2005, security guards followed Harmon as she walked into the parking lot with Trelis, an employee, and while Harmon and Trelis were discussing work issues. The guards’ surveillance caused Trelis to abruptly end their discussion. This was the first time that Trelis had been followed by security guards during her 25 years of employment at Turtle Bay. On March 3, a security supervisor followed Harmon and Trelis into the parking lot again. Harmon and Trelis were again talking about work issues, but the security supervisor told them to end their conversation. Also on March 3, Harmon and Webb were conferring on work issues in the cafeteria. A security guard watched them from an adjacent table. They went outside to finish their conversation, but the security guard followed them. On March 10, Harmon and Dela Cruz met at the loading dock so that Dela Cruz could give Harmon some signed petitions. A security guard watched them. Dela Cruz felt uncomfortable, so they walked into the parking lot and to Dela Cruz’ car. The security guard followed them, causing Dela Cruz to shield his action of giving the petitions to Harmon.

Like their shadowing of Marsh, the security guards’ shadowing of Harmon is “activity [that] clearly constitute[s] more than mere observation.” The surveillance would likely and reasonably inhibit employees from talking to Harmon, and would instill fear in employees if they did talk to Harmon. Indeed, the employees displayed this fear during the surveillance. The Respondents have provided no credible or reasonable basis for this surveillance. On February 10 and March 3 and 10, 2005, the Respondents unlawfully surveilled Harmon and their employees while Harmon and the employees were engaged in pro-

tected activity. The Respondents’ actions violated Section 8(a)(1) of the Act.

On January 19, 2005, Harmon and Laura Moye walked through the work areas of the hotel and were followed within several feet by Dougher. Harmon was new to Turtle Bay, and Moye was introducing her to the employees. These introductions likely took some amount of time, and in turn, would have distracted some employees from their work. Although Dougher’s actions would otherwise constitute unlawful surveillance, similar to the surveillance of Marsh and Harmon described above, I conclude that the Respondents had a reasonable basis for this surveillance. I realize that the problem with this determination is that Dougher began his surveillance before Moye and Harmon disrupted any workers with introductions, just as Dougher had begun following Santa Maria before Santa Maria had talked to any working employees. However, in the absence of other evidence, for example, that Dougher did not know that such introductions or disruptions would occur when he began his surveillance (making such an assumption would be inappropriate in these circumstances because Harmon was new to Turtle Bay and both Harmon and Moye were walking through the work areas together, facts which were known by Dougher), I conclude that the evidence fails to establish this violation.

#### *E. Disparagement and Threat—Complaint Paragraph 21*

“It is well settled that the Act countenances a significant degree of vituperative speech in the heat of labor relations. Indeed, ‘[w]ords of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1).’ *Sears, Roebuck & Co.*, 305 NLRB 193 (1991).” *Trailmobile Trailer, LLC*, 343 NLRB 95 (2004). Flip and intemperate remarks that are mere expressions of personal opinion are protected by the free speech provisions of Section 8(c). *Id.* “Employer statements must be viewed in context and not in isolation to determine if they have the reasonable tendency proscribed by Section 8(a)(1).” *Flying Foods Group, Inc.*, 345 NLRB 101, 107 (2005). In addition, “the standard for determining whether a statement violates Section 8(a)(1) is an objective one that considers whether the statement has a reasonable tendency to coerce the employee or interfere with Section 7 rights, rather than the intent of the speaker.” *Id.*

On March 5, 2005, Dougher engaged in a tirade against Harmon. The tirade occurred in the employee cafeteria and in the presence of employees. His harangue included a threat to discipline any employee who talked to Harmon. See *Trailmobile Trailer, LLC*, *supra* (“Here, the comments of [the Respondent’s managers], while disparaging, . . . did not reasonably convey any explicit or implicit threats”). Moreover, Dougher put teeth in his threat to Harmon by saying the NLRB did not control him and he was not interested in what the NLRB did.

In determining whether Dougher’s statements have a reasonable tendency to coerce employees, one must guard against assuming that employees have the same legal knowledge, or indeed, confidence in the law’s efficacy, that a sophisticated, but not cynical, person might possess. That is, whether Dougher would ultimately be successful in disciplining any or every employee who talked to Harmon is not the question. And,

in any event, the standard is an objective one. Under all of the circumstances, I conclude that Dougher's disparagement of Harmon, coupled with his threat to discipline any employee who talked to Harmon, has a reasonable tendency to coerce employees or interfere with Section 7 rights in violation of Section 8(a)(1).

*F. Threat of Closure—Complaint Paragraph 25*

An employer's threat of retaliation for employees' protected activity violates Section 8(a)(1) of the Act. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). An employer may make a prediction as to the precise effects that union activity will have on the company, but

the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization.

395 U.S. at 617. The General Counsel contends that the Respondents unlawfully threatened to close Turtle Bay in retaliation for its employees' protected, union activities. The threat is contained in Butt's October 22, 2004 memorandum to all employees. The memorandum refers to the boycott and picketing by the employees and Union, and states, "the union has made a terrible mistake. We would rather close the resort than allow you and your families to be used as hostages." The reference to being used as hostages refers to the employees' participation in the union's boycott and picketing. The memorandum directly threatens to close Turtle Bay (the employer would prefer to close the resort) in reprisal for the protected activity (boycott and picketing) and the continuation of such activity.

The only economic facts in the memorandum to support the threat of closure are reduced hours of operation for Turtle Bay's food and beverage outlets and shutting down some guest rooms in all three wings of the hotel. (GC Exh. 6.) No facts are given to show the extent of the business slowdown, how long the slowdown had been occurring, whether the slowdown had increased when the boycott and picketing began, whether the slowdown was due to or influenced by seasonal or other factors, or any other facts that could make the threat even appear as a prediction based on factors beyond the Respondents' control.

In determining whether an employer's statement is an unlawful threat or a fact-based prediction, the Board considers the totality of the relevant circumstances. *NLRB v. Gissel Packing Co.*, 395 U.S. at 589; *Mediplex of Danbury*, 314 NLRB 470, 471 (1994). The relevant circumstances of the memorandum include the Respondents' unfair labor practices before the memorandum was issued, including its surveillance of union representatives whenever they entered the resort. The relevant circumstances also include the boycott and picketing, but these activities cut both ways because even if they were causing a business slowdown, they were also the very protected activities that were the alleged cause of the threat to close the resort.

The Respondents cite several cases, none of which are on point. In *NLRB v. S & H Grossinger's, Inc.*, 372 F.2d 26 (2d Cir. 1967), enfg. 156 NLRB 233 (1965), the court modified the

Board's order to eliminate the reference to threats of reprisals. The threats were that the advent of the union would "stop the wheels of progress and growth" at the hotel, and would "retard the progress" at the hotel, and result in "less steady work." The statements the court declined to enforce are not comparable to the Butt's threat to close Turtle Bay.

In *NLRB v. Collins & Alkman Corp.*, 338 F.2d 743 (5th Cir. 1964), the court declined to enforce the portion of the Board's order finding an unlawful threat in a letter to employees that urged, "don't gamble your future security and progress by voting for the [Union]. Let's continue to grow together—vote no." The letter listed union companies that had also closed down, and the letter argued that a union could not prevent a company from closing down. The company's letter was a reply to a letter from the union that listed nonunion companies that had closed down. The company's letter in *Collins & Alkman Corp.* is not comparable to the memorandum and the threat in the present case. Urging employees not to gamble their security and progress, even if the Board would now hold that such statements do not violate Section 8, is much different from telling employees what the employer would rather close if the employees continued to engage in protected, concerted activities. In the context of the memorandum and the Respondents' other violations of the Act, employees would reasonably understand from the wording of the threat that they were endangering their jobs, and that the Respondents would, and would rather, close Turtle Bay.

In *Spartech Corp.*, 344 NLRB 576 (2005), the Board adopted, without exceptions, the judge's dismissal of a Section 8(a)(1) charge arising from an employer's speech to his employees. The employer said that if the company conceded to the union's unreasonable demands, it would lose business and could close. However, the employer then stated that the company would not give in to the union's unreasonable demands. Accordingly, there was no threat of closure, and the allegation was dismissed. In the present case, there is a threat. Butt told the employees that the Respondents would rather close than have the employees continue in their organizing activities, even though the employees may only be "hostages" in such activities.

In Butts' memorandum, distributed to all employees, the Respondents threatened to close Turtle Bay in retaliation for the employees' protected, concerted activity. This threat violated Section 8(a)(1).

*G. Validation of Union Representatives' Parking at Turtle Bay—Complaint Paragraph 22*

An employer violates Section 8(a)(5) and (1) of the Act when it unilaterally makes changes in unit employees' existing terms and conditions of employment without first bargaining with the union about the proposed changes. *NLRB v. Katz*, 369 U.S. 736 (1962). In the present case, the parties were engaged in negotiations for a collective-bargaining agreement throughout the period involved in this case. Accordingly, the Respondents' duty "encompasses a duty to refrain from implementation of changes at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). "This

proscription against unilateral action applies not only to mandatory bargaining subjects that were specifically covered in the expired contract, but also to ‘an activity which has been ‘satisfactorily established’ by practice or custom; an ‘established practice’; an ‘established condition of employment’ . . . [or] a ‘longstanding practice.’” *Golden State Warriors*, 334 NLRB 651, 652 (2001) (citation omitted).

The Respondents’ practice of providing free parking to the union representatives when they came to Turtle Bay pursuant to the contractual access provision was longstanding. The Respondents did not offer evidence of any time that their free parking practice for union representatives was not in effect before January 2005. This practice was known by and approved by the Respondents, which is shown by the fact that the union representatives’ parking tickets were stamped at the security dispatch window or in the human resources office. Approval is also shown by the failure of the Respondents to object to the practice before January 2005.

Union access to the employer’s facility is a term and condition of employment. *Park Manor Nursing Home*, 314 NLRB No. 127 (1994) (not reported in Board volumes). Moreover, the expired collective-bargaining agreement that still governed the relations between the Union and the Respondents provided for union access to Turtle Bay, and that contractual term survived the expiration of the contract. *Fabric Warehouse*, 294 NLRB 189 (1989).

Citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), the Respondents contend that they were not obligated to bargain with the Union over the parking fee because the bargaining obligation only extends to matters involving the relationship between the employer and the employees. The Respondents argue that the parking fee issue is between the Respondents and the Union, not the employees.

This artificial distinction is rejected. First, the Union is the representative of the employees. Therefore, in this sense, what is done to the Union is also done to the employees. Second, the necessary result of interfering with the union’s access to the employees is to interfere with the employees’ access to the union. Third, union access is a mandatory subject of bargaining. Fourth, union access was covered in the expired collective-bargaining agreement.

The Respondents appear to contend that the parking fee does not involve the union’s access to Turtle Bay. That contention is also rejected. The parking fee certainly burdens the Union’s access to Turtle Bay, a burden that had not existed before January 2005. Moreover, an employer that takes an action against a union, but not against the employees, may still violate Section 8 when the action interferes with the employees’ Section 7 rights. *Diamond Walnut Growers, Inc. v. NLRB*, 53 F.3d 1085, 1089–1090 (9th Cir. 1995), enfg. 312 NLRB 61, 69 (1993). The unilaterally imposed parking fee changes the Union’s access to Turtle Bay, and to that extent, changes the employees’ access to their statutory representative. As the Board stated in *Axelson, Inc.*, 234 NLRB 414, 415 (1978), which involved payments to employees for performing union functions, “[s]uch a matter concerns the relations between an employer and its employees in that it is related to the representation of the members of the

bargaining unit in negotiations with an employer over terms and conditions of employment.” (Citations omitted.)

The Respondents also argue that providing the Union with free parking at Turtle Bay is a crime under Section 302 of the Labor Management Relations Act (“LMRA”), 29 U.S.C. § 186. That statute provides that it is unlawful for an employer to pay or deliver money or other thing of value to a union representative. Section 302 of the LMRA was enacted to prohibit “corruption of collective bargaining through bribery of employee representatives by employers [and] with extortion by employee representatives.” *Arroyo v. U.S.*, 359 U.S. 419, 425–426 (1959). Payments or things of value that assist the negotiating process, and which do not inure to the benefit of an individual, do not violate the statute. *Machinists Local 964 v. BF Goodrich Aerospace Aerostructures Group*, 387 F.3d 1046 (9th Cir. 2004). Turtle Bay’s previous practice of allowing union representatives to park at the resort without charge when the representatives came to the resort pursuant to the access provision of the agreement was a courtesy that assisted the negotiating process and did not inure to the benefit of any union employee. Moreover, the practice was consistent with Turtle Bay’s allowance of persons having business with the resort to park there while conducting their business. Accordingly, the practice did not violate Section 302 of the LMRA.

The Respondents make no claim that union representatives ever used free parking at Turtle Bay for anything other than their duties under the collective-bargaining agreement. Turtle Bay is a substantial enterprise with approximately 360 unit members. Accordingly, a union representative is assigned to the resort 2 days a week. The Respondents had a long and established practice of allowing union representatives to park at Turtle Bay without charge. The Supreme Court explained in *NLRB v. Katz*, 369 U.S. at 747, that unilateral action “will often disclose an unwillingness to agree with the union. It will rarely be justified by any reason of substance.” Moreover, and although it is not determinative of the question, it is apparent that the motivation for the Respondents’ change in parking privileges was antiunion animus.

An employer violates Section 8(a)(5) and (1) of the Act by unilaterally and without notice making a material, substantial, and significant change in a contractual access provision. *Fabric Warehouse*, 294 NLRB at 192; *Peerless Food Products*, 236 NLRB 161 (1978). In *Berkshire Nursing Home*, 345 NLRB 220 (2005), the employer, who had two parking lots adjacent to its facility, closed one of the parking lots to most employees because of crowding and safety problems. This resulted in the excluded employees being required to park at a distance up to a 5-minute walk from the facility. The Board determined that the difference between a 1-minute walk from the closed lot and a 3- to 5-minute walk from the new parking area to the facility was not a sufficiently significant difference to warrant imposing a bargaining obligation.

Because the General Counsel does not address the amount of the parking fee instituted in January 2005, he seems to take the position that any unilateral change from free parking violates the Respondents’ bargaining obligations under the Act. However, this position ignores the requirement that such changes be significant. There was no evidence of the amount the Respon-

dents require union representatives to pay for parking. It may be that the parking fee is so high as to constitute a significant change (the approximate one-half-mile distance from Turtle Bay's entrance to the hotel would enhance the interference imposed by an inordinately high fee), or so low as to constitute an insignificant change. In addition, there is no evidence that union representatives have come to Turtle Bay any less frequently after the change in parking privileges than before the change. Nevertheless, this negative "fact" is simply consistent with, and not determinative of, the conclusion reached herein that the evidence fails to show the change was significant. For the foregoing reasons, I am unable to conclude that the change in parking privileges was a significant change that would require the Respondents to bargain before making the change. Accordingly, I will recommend that this allegation be dismissed.

#### *H. Discipline of Jeannie Martinson—Complaint Paragraph 26*

In *Nor-Cal Beverage Co.*, 330 NLRB 610 (2000), the employer disciplined an employee who called a coworker a "scab" after the coworker said that he would cross and wanted to cross a picket line at another facility. The next day, the employee said to his coworkers, "Oh, here's the company's favorite scabs." As in the present case, the employee was disciplined for violating the employer's no-harassment policy. Unlike the present case, the written discipline issued to the employee did not specifically refer to the employee's use of the word "scab." The Board found that the "scab" epithets were used in the course of protected activity, and, citing *Linn v. Plant Guards Local 114*, 83 U.S. 53, 60–61 (1966), for the Supreme Court's approval that "the Board has concluded that epithets such as 'scab' . . . are commonplace in these struggles and [are] not so indefensible as to remove them from the protection of Section 7," held that the employee's use of "scab" and "scabs" did not lose the protection of the Act. See also *Letter Carriers Local 496 v. Austin*, 418 U.S. 264, 282–283 (1974). The Board held that the employee's use of the word "scab," unaccompanied by any threat or physical gestures or contact, did not deprive the employee of the protection of the Act. Accordingly, the Board held that the employer's discipline of the employee for calling his coworker a scab violated Section 8(a)(3) and (1) of the Act.

The nexus between the employee's use of the word "scab" and the employee's protected activity was critical to the Board's analysis in *Nor-Cal*, supra. In the present case, Martinson credibly testified that she was joking with the cook when she said, "Oh, looks like we are working with a bunch of scabs." The question is whether Martinson's subjective nonseriousness when she made her remark removes the statement from the protection of the Act. I conclude, under these circumstances, that Martinson's statement was said in the course of protected activity despite her subjective intent to joke about it. What Martinson said is more important than her subjective intent.

The Respondents did not consider whether or not Martinson was joking when they disciplined Martinson. The Respondents disciplined Martinson solely for using the word "scabs." Also, the context in which Martinson used the term must be consid-

ered. *Nor-Cal Beverage Co.*, 330 NLRB at 611. Martinson made her statement to the cook the day after a 1-day strike in which she and other employees did not cross the picket line, but other employees, especially newer employees, did cross the picket line. And, her statement referred to the employees who had crossed the picket line the previous day. Moreover, an employee will rarely use the term "scab" except in the course of union activity because it directly refers to protected activity.

As the Board has stated, "epithets such as 'scab' . . . are commonplace in these struggles." A labor struggle has been occurring at Turtle Bay throughout the period involved in this case. Martinson's statement was made in this context. If the statement were not made in the course of protected activity, Martinson's subjective intent would not affect the result. Similarly, her subjective intent does not and should not affect the result in these circumstances where her statement was made in the course of protected activity. The factual issues are: what did Martinson say and why did the Respondents discipline her. The evidence shows that Martinson used the word scab to describe other employees, and the Respondents disciplined her for saying this. She did not use profanity, she did not threaten violence, and she did not know her brief and private discussion with the cook had been overheard.

The Respondents cite various cases in support of their argument that they may lawfully discipline Martinson for using the word "scab." The most recent of the cases cited by the Respondents is 1965. In that case, *NLRB v. R. C. Can Co.*, 340 F.2d 433 (5th Cir. 1965), the employee was disciplined for threatening physical violence against the plant manager and he would "kick the hell out of him the first chance I got." Id. at 434. The court declined to enforce the Board's order that the employee be reinstated. *R. C. Can Co.* is inapposite to the facts in this case.

In *Caterpillar Tractor v. NLRB*, 230 F.2d 357 (7th Cir. 1956), the court declined to enforce the Board's order in which the Board found the employer had violated the Act in disciplining employees who had worn buttons saying, "Don't be a Scab." The court stated that the use of the word "scab" was explosive and connoted opprobriousness and vileness. The court's decision has not been interpreted to allow a general ban on the use of the word "scab." E.g., *NLRB v. Mead Corp.*, 73 F.3d 74, 79 (6th Cir. 1996). Moreover, the case was decided under circumstances that at least portended violence. In the present case, although the Respondents allege that the statement constituted harassment, there is no contention or evidence that violence or the threat of violence was involved in any way. Whatever connotations the word "scab" may have had in 1956, those connotations were apparently meliorated by 1966, the date of the Supreme Court's decision in *Linn*. Moreover, the law in this area, as most recently clarified in *Nor-Cal Beverage Co.*, is that the use of the word "scab," when used without being accompanied by violence or threats or physical gestures, and used in the course of protected activity, may not be sanctioned. *Nor-Cal Beverage Co.*, 330 NLRB 610 (2000).

As the Board explained in *Nor-Cal Beverage Co.*, the *Wright Line* analysis is not appropriately applied in the present circumstances because the employer's motive is not in issue. *Neff-Perkins Co.*, 315 NLRB 1229 fn. 2 (1994). The Respondents



admittedly disciplined Martinson because she described other employees as “scabs.” The question is whether Martinson’s statement was protected.

Under all the circumstances, Martinson was engaged in protected activity when she said to the cook, “Oh, looks like we are working with a bunch of scabs.” The Respondents disciplined Martinson for this protected activity. Accordingly, the Respondents’ discipline of Martinson violated Section 8(a)(1) and (3) of the Act.

*I. Suspension of Timothy Barron—Complaint  
Paragraph 26*

The Respondents admit that they suspended Barron for 5 days because he had called Baeseman a “scab.” In Barron’s encounter with Baeseman, no vulgarity was used, and no violence occurred or was threatened. No physical contact occurred or was threatened. Barron’s use of the word “scab” was in the course of protected activity and occurred during a brief, protected discussion between two coworkers who were on opposing sides of the labor dispute then occurring at Turtle Bay.

Under *Nor-Cal Beverage Co.*, supra, an employer violates Section 8(a)(1) and (3) of the Act when it disciplines an employee for using the word “scab” in the course of protected activity, and the employee’s statement is unaccompanied by any threat or physical gestures or contact.

The Respondents contend that Barron intended to injure Baeseman, and that Barron could properly be disciplined for calling Baeseman a scab with such an intent. (See R. Br. 222.) The response to this contention is twofold. First, Barron was suspended for his use of the word “scab,” not his intent when he said it. Second, the evidence does not support the claim that Barron intended to injure Baeseman. Indeed, there is no credible evidence to support this contention, a contention that is also contradicted by Baeseman’s demeanor in describing the incident. By calling Baeseman a scab, Barron was likely trying to persuade Baeseman to change his antiunion position by telling Baeseman how others viewed his actions.

The Respondents argue that Barron’s statements to Baeseman were disruptive and violated the Respondents’ alleged zero-tolerance policy on harassment. However, the Respondents did not discipline Barron because he had disrupted the workplace or had violated the policy on harassment. The Respondents suspended Barron because he had called Baeseman a “scab.” In addition, the Board dealt with a similar contention in *Nor-Cal Beverage Co.*, 330 NLRB at 612 fn. 5:

While we agree with our colleague that employees enjoy Sec. 7 rights both to engage in and refrain from supporting a union, we fail to see how an employer’s punishment of an employee’s exercise of either right can be justified by an assertion that language used by the employee in the course of exercising that right, although nonthreatening, was viewed as “harassment” by another employee who disagreed with him. The point is that the Act prohibits an employer from punishing an employee’s expression of either prounion or antiunion views unless they are manifested in a manner that exceeds the protection of the Act; and, as explained above, that is not the case here.

See also *New York Telephone Co.*, 266 NLRB 580, 582 (1983) (labeling the activity harassment does not change or affect the protected nature of the activity). Similarly, Barron’s expression of his prounion views was not made in a manner that exceeds the protection of the Act. Barron’s statements were protected, and the Respondents admittedly suspended him for uttering those protected statements. Accordingly, the Respondents’ suspension of Barron violated Section 8(a)(1) and (3) of the Act.<sup>10</sup>

*J. Termination of Mark Feltman—Complaint  
Paragraph 26*

Under the test set forth in *Wright Line*, the General Counsel has the burden of proving by a preponderance of the evidence that the employee’s union or other protected concerted activity was a substantial or motivating factor in the employer’s discharge of an employee. *Wright Line*, 251 NLRB 1083 (1980), enf’d. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). To meet this burden, the General Counsel must establish four elements. First, the existence of activity protected by the Act. Second, that the Respondent was aware of such activity. Third, that the alleged discriminatee suffered an adverse employment action. Fourth, a motivational link, or nexus, between the employee’s protected activity and the adverse employment action. *American Gardens Management Co.*, 338 NLRB 644 (2002).

If the General Counsel satisfies his initial burden under *Wright Line*, the burden then shifts to the employer, in the nature of an affirmative defense, to demonstrate that the same action would have taken place even in the absence of the protected conduct. In meeting this burden, the employer cannot simply state a legitimate reason for the action taken, but rather must persuade by a preponderance of the evidence that it would have taken the same action in the absence of the protected activity. *T & J Trucking Co.*, 316 NLRB 771 (1995). Nevertheless, the employer’s defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it. *Merrilat Industries*, 307 NLRB 1301, 1303 (1992). The ultimate burden of proving discrimination always remains with the General Counsel. *Wright Line*, supra.

The first three elements of the *Wright Line* analysis have been established and are not seriously disputed by the Respondents. Feltman engaged in protected activity by participating in the strike on May 21, as well as by wearing union buttons that were observed by Ramos and her managers. The Respondents knew of Feltman’s protected activity on May 21 because Dougher observed Feltman on the picket line, and the Respondents knew Feltman was wearing union buttons because Ramos and her manager commented on the buttons. In addition, Ramos admitted that she learned of Feltman’s May 21 picket line ac-

<sup>10</sup> Because a *Wright Line* analysis is unnecessary, the fact that the Respondents initially threatened to discipline Barron for swiping out wearing his regular clothes, as well as evidence relating to disparate treatment, will not be considered because the Respondents’ motivation in disciplining Barron is not in issue. See *U.S. Coachworks, Inc.*, 334 NLRB 955, 957 (2001) (shifting explanations for disciplining an employee may provide evidence of unlawful motivation).

tivity when she supposedly investigated the charge against Feltman. The Respondents dispute the fourth element of the analysis, viz, the motivational link between Feltman's union activity and his termination. The Respondents also contend that they would have discharged Feltman without regard to his protected activities.

The motivational link is established by proof of antiunion animus. *Robert F. Kennedy Medical Center*, 332 NLRB 1536 (2000). Antiunion animus may be found from direct and from indirect or circumstantial evidence. Indeed, indirect evidence is often the only way in which motivation can be proven since an employer will rarely, if ever, openly acknowledge that an employee was or was being fired because of some reason that the law forbids. *Sahara Las Vegas Corp.*, 284 NLRB 337, 347 (1987). In recognition of this plain and pervasive fact, courts have devised alternative methods for a party to prove motivation, including the use of indirect or circumstantial evidence. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Wright Line*, supra.

Motive may be inferred from the total circumstances of the case, *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), including disparate treatment of the alleged discriminatee, *Holiday Inn East*, 281 NLRB 573, 575 (1986), the timing of the employment action in relation to the protected activity, *Taylor & Gaskin, Inc.*, 277 NLRB 563 fn. 2 (1985), failure to adequately investigate the alleged misconduct, *New Orleans Cold Storage & Warehouse Co.*, 326 NLRB 1471 (1998), and concurrent 8(a)(1) violations. *Greystone Bakery*, 327 NLRB 433 (1999); *Electronic Data Systems*, 305 NLRB 219 (1991). The employer's asserted reasons for the discharge may also disclose animus if those reasons are found to be false or pretextual. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); see *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000).

First, there is direct evidence of union animus, not only concerning the Union, but also concerning Feltman because of his involvement with the Union. After Feltman complained to Ramos about Marsh, Ramos and Feltman's manager considered Feltman to be a good and favored employee. Ramos even told Feltman that he was in line to receive a pay raise above the limits of the current collective-bargaining agreement. However, less than 2 months after Ramos told Feltman about his prospective pay increase, Feltman walked into her office wearing a union button. Ramos said she thought Feltman had signed the antiboycott petition, and after Feltman said no, Ramos replied, "Oh, oh." When Feltman again came into the human resources office wearing a union button, another manager in the office, on seeing the button, told Feltman, "I thought you were [a] more sensible guy, but who am I." This statement, like Ramos' "oh, oh" comment, contains the implied threat that being prounion would not be favorable to Feltman's employment opportunities at Turtle Bay.

The direct evidence also includes the Respondents' shadowing of union representatives whenever they came on Turtle Bay property. This shadowing started at least in June 2004, and possibly as early as March 2004. In addition, the Respondents solicited the police on several occasions to assist in evicting union representatives from Turtle Bay and, on one or more

occasions, to witness the Respondents issue trespass notices to union representatives. Accordingly, the direct evidence demonstrates antiunion animus.

The indirect evidence of the Respondents' motivation shows that Feltman was treated differently from similarly situated employees. For example, Stone had called Mendivil a "f—ing ass" and squirted Mendivil with a water gun. Stone did not receive any discipline for these actions. The Respondents argue that Feltman's actions are different from Stone's actions because Feltman threatened a federal witness because of his testimony. As noted above, this argument fails for several reasons.

First, calling someone a "f—ing ass," while crude, is not a threat. Even if there could be circumstances in which such an epithet could be taken as a threat, no such circumstances exist herein. There was no physical display by Feltman, and there was no physical contact or threat of contact. There is no history of physical confrontations between Feltman and Mendivil. Indeed, there is no evidence of any physical confrontations, or even harsh words (except Delosantos's epithet to a striking employee), between prounion employees and antiunion employees at Turtle Bay throughout the period of time in this case. Under these circumstances, and considering that the epithet rather crudely expresses only the opinion of the speaker, just as Stone likely had expressed his opinion, the alleged epithet was not threatening.

Moreover, Feltman's alleged epithet immediately followed Mendivil's failure or refusal to answer Feltman's question, rather than the question itself. Feltman's alleged epithet could just as easily have referred to Mendivil's refusal to answer a simple question from an acquaintance and a coworker. Mendivil could have answered the question, "How was court," with one or several words and without discussing or referring to testimony. Indeed, a simple "okay" could have sufficed. But, Mendivil refused to answer. An epithet under these circumstances, while crude and unfortunate, is not completely surprising (especially considering Ramos's testimony that employees quite frequently use the word) and is not threatening.

In contrast, a possibly threatening use of the word is found in the statement by Delosantos on May 21, 2005, to a picketing employee. Delosantos, while crossing the picket line, told the employee, who was walking the picket line, to "f— off." This statement, under the circumstances of the picket line and the confrontation of prounion and antiunion workers, is at least closer to a threat than the epithet allegedly used by Feltman. Nevertheless, Delosantos received only a written warning for this conduct.

One distinguishing characteristic of Stone's conduct is that he shot a water gun at Mendivil while he was calling Mendivil a "f—ing ass." However, this difference would warrant more severe discipline for Stone than Feltman. Yet, Stone received no discipline for his actions. Indeed, there is no evidence that any employee has been terminated for cursing, except Feltman. The Respondents' characterization of Feltman's alleged epithet as threatening is false, and does not distinguish Feltman's conduct from Stone's conduct.

Accordingly, the Respondents treated Feltman disparately from other employees. The Respondents attempt to justify their disparate treatment by falsely characterizing Feltman's conduct.

The Respondents' explanation of Feltman's discipline is a pretext.

Another factor from which antiunion animus could be inferred is the timing of the employment action. The Respondents suspended Feltman and decided to discharge him within approximately 6 weeks of the date he walked on the May 21 picket line. More importantly, the Respondents made their decision to discharge Feltman within 2 days of their failed attempt to obtain a Federal court injunction against the Union. This timing is more than merely suspicious. It supports the finding that the Respondents were motivated by antiunion animus in their decision to discharge Feltman.

An employer's failure to investigate or adequately investigate the stated reasons for an employee's discharge tends to show that the stated reasons were not determinative in the employment decision, and that the discharge would occur without regard to the viability of the stated reasons. Ramos had been off-island on June 10, the date Feltman was charged and suspended by Dougher. She returned on June 11, a Saturday, and met with Feltman, Moye, and Harmon. She decided that day to terminate Feltman's employment. There is no evidence that she investigated anything. She claimed to have learned in her investigation that Feltman had walked on the picket line on May 21, but how this fact would be relevant to a proper investigation of Feltman's conduct on June 10 is a mystery. The Respondents' failure to conduct an adequate investigation into the reasons for the termination of Feltman is further evidence of the Respondents' antiunion animus.

An employer's concurrent 8(a)(1) violations may also demonstrate unlawful animus. The Respondents' concurrent 8(a)(1) violations, as set forth above, are numerous. In particular, Butt's violation of Section 8(a)(1) by threatening closure if the employees persisted in their union activities is a significant factor. *Lemon Drop Inn*, 269 NLRB 1007, 1007 (1984) ("the Board and the courts have long regarded union animus demonstrated by 8(a)(1) coercion as a highly significant factor in determining motive"). The Respondents' unlawful actions, including the shadowing of union representatives, summoning police to assist in evicting the union representatives from Turtle Bay, surveillance of union and protected activities, and the berating of Harmon and threatening to discipline any employee she talked to, are among the 8(a)(1) violations that demonstrate unlawful animus.

When an employer attempts to prove its affirmative defense to a charge of discrimination under Section 8(a)(3), it must prove that it would have taken the same action in the absence of protected activity, not that it could have taken such action or that it otherwise had a legitimate reason for the action. *T & J Trucking Co.*, 316 NLRB 771 (1995); *Center Property Management*, 277 NLRB 1376 (1985). The Respondents have not proven that they would have taken the same action against Feltman in the absence of his protected activity. Feltman's "misconduct," stripped of the Respondents' unproven and inappropriate characterization, amounts to cursing at a coworker. When Stone called Mendivil the same epithet, and exacerbated the name-calling by shooting Mendivil with a water gun, Stone was not even disciplined. When Delosantos used similar coarse

language to a coworker in a threatening manner and in threatening circumstances, she was given a written warning.

The Respondents argue that even if Feltman was treated differently from other employees, his termination was justified because the resort may lawfully discharge employees who use profane and indecent language. *NLRB v. Longview Furniture Co.*, 206 F.2d 274 (4th Cir. 1953). *Longview Furniture* is inapposite to the present case. Feltman was not discharged for using profane language, but for threatening a federal witness. Moreover, the Respondents' asserted reason for Feltman's discharge is pretextual.

The Respondents argue that Feltman was discharged for violating Turtle Bay's "zero-tolerance" policy. However, the Respondents did not cite its "zero-tolerance" policy when Feltman was terminated. Moreover, this policy requires nothing more than making note of instances of harassment. It does not require the imposition of any discipline, much less termination, for any particular instance of harassment. As the Respondents' witnesses explained, it all depends on the facts. The Respondents have answered instances of alleged harassment by imposing no discipline (Stone), by issuing a written warning (Delosantos), and by suspending a repeated offender (Pinacate). Feltman was the only employee who was ever fired for violating the "zero-tolerance" policy, assuming of course that the policy entered into the decision. Accordingly, the "zero-tolerance" policy did not enter into the Respondents' decision to discharge Feltman and, if it did, the Respondents disparately applied the policy to Feltman. In addition, the Respondents' present attempt to interject this "zero-tolerance" policy as the reason for Feltman's discharge represents a change from the reason originally given for Feltman's termination. Such shifting explanations provide additional evidence of unlawful motivation. *U.S. Coachworks, Inc.*, 334 NLRB 955, 957 (2001).

The Respondents argue that Feltman "engaged in a cruel, deliberate and mean spirited act of intimidation toward Mendivil. Feltman tried to silence a Federal court witness, and to punish and intimidate that witness for his testimony." (R. Br. 229.) This factual argument is without merit. There was no threat in Feltman's words, there was no threat in his gestures, and there was no threat in the circumstances. The Respondents' argument continues the pretext the Respondents first planted in their termination memorandum, which accuses Feltman of a "federal crime" for "threatening or retaliating against a federal witness." (GC Exh. 27.) Thus, the Respondents' contrived and fanciful factual argument arises from the reason set forth in their termination memorandum, a reason that was likely inserted in order to stigmatize Feltman and to give his encounter with Mendivil as ignominious and criminal a characterization as possible. However, by doing so, the Respondents magnified their inability to prove the charge they leveled against Feltman and highlighted the pretextual nature of their reason for Feltman's discharge.

The evidence, including the demeanor of Dougher and Ramos, shows that the Respondents did not actually believe Feltman had threatened Mendivil for being a federal witness, much less had committed a crime in doing so. However, if the Respondents did believe that charge and if they did assert that charge against Feltman in good faith, there is no evidence that

they reported this allegedly perceived crime to the federal authorities. Having failed in this duty, the Respondents must acknowledge that they and their managers might have committed the crime of misprision of felony. 18 U.S.C. § 4. The Respondents have also admitted that they engaged in criminal conduct by providing free parking to the union representatives during their onsite visits pursuant to the contract. Such self-incriminating admissions, rare under the best of circumstances, are easily made by these Respondents who understand that the underlying allegations of criminal conduct—giving something valuable to a union official in violation of the statute and threatening a federal witness—have no basis in fact or law and are pretextual, meant to conceal the Respondents' true reasons for imposing a parking fee on union representatives and for terminating Feltman's employment.

The determination that the reasons advanced by the Respondents for terminating Feltman's employment are a pretext for their actual motive in taking that action necessarily means that the asserted reasons were not relied on. Accordingly, there is no need to further address these reasons because a finding of pretext "leav[es] intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981); "A finding of pretext defeats any attempt by the Respondent to show that it would have discharged the discriminate[e]s absent their union activities." *Rood Trucking Co.*, 342 NLRB 895, 899 (2004). Alternatively, because the Respondents' reasons for discharging Feltman are unsupportable under the standards it normally applies to its other employees, I conclude that the Respondents have not proven that they would have taken the same action in the absence of Feltman's protected activity. *Hospital San Pablo, Inc.*, 327 NLRB 300 (1998).

The animosity between the Respondents and the Union seems to have increased throughout the period involved in this case. Certain events exacerbated the enmity, including the Union's March 25, 2004 rally through Turtle Bay's hotel lobby and the Respondents' defeat in their federal action against the Union on June 9, 2005. These exacerbating tensions led to, respectively (1) the shadowing of union representatives throughout Turtle Bay whenever they came onto resort property, and (2) the firing of Feltman.

Thus, increased and increasing tensions, brought on by the failure to reach agreement at the bargaining table, and perhaps leading to frustration on both sides of the table, led to violations of the law, often through the abuse of power. Ill-conceived actions were engendered, such as the shadowing of union representatives and the firing of a good employee, that the employer may have never done in the past and would not otherwise think of doing. The actions may be borne of frustration, may be ineffectual, may be intended to harm the other side and its supporters, and may even be puerile at times, but the actions, as found, are nevertheless illegal.

For all of the foregoing reasons, the Respondents violated Section 8(a)(3) and (1) in terminating the employment of Feltman.

#### CONCLUSIONS OF LAW

1. The Respondents, Oaktree Capital Management, LLC (Oaktree), and TBR Property, LLC (TBR Property), and Benchmark Hospitality, Inc. (Benchmark) are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. UNITE HERE! Local 5 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. Oaktree and TBR Property are single employers of the employees at Turtle Bay Resort, Kahuku, Hawaii. Benchmark Hospitality, Inc. is a joint employer of the employees at Turtle Bay with TBR Property and its single employer, Oaktree.

4. At all material times, the Union has been the designated exclusive collective-bargaining representative of the Respondents' employees at Turtle Bay, in the following appropriate bargaining unit within the meaning of Section 9(b) of the Act:

All employees performing work at the Turtle Bay Resort facility covered under the collective-bargaining Agreement between Hilton and the Union effective for the period February 28, 1999 through February 28, 2002.

5. The Respondents violated Section 8(a)(1) of the Act by unlawfully maintaining the following rules:

a. [S]olicitation of any kind of one staffmember by another is prohibited while either person is on working time or in a public or work area.

b. Distribution by staffmembers of advertising materials, handbills, printed or written literature of any kind in working or public areas of our Resort is prohibited at all times.

c. Should a staffmember wish to visit the Resort with family or friends, they may do so with the prior approval of their manager and Planning Committee Member. You will be required to have a 'Return to Property' pass.

d. The Respondents' rule that prohibits employees' "presence in the Resort more than 30 minutes before or after your shift."

e. "Being present on company premises at any time other than the employee's assigned work shift, unless specifically authorized by his/her supervisor or picking up paycheck" is misconduct.

f. Walking off the job will be considered voluntary termination.

g. The Respondents' rule prohibiting "refusing to cooperate during a company investigation."

6. The Respondents violated Section 8(a)(1) of the Act by telling union representatives that they were trespassing at Turtle Bay and that they had no right to be at Turtle Bay, by telling the Union that it could not collect dues at Turtle Bay, by summoning police to assist in evicting union representatives from Turtle Bay, by summoning police to witness the Respondents handing Trespass Notices to union representatives, by issuing and handing trespass notices to union representatives, by evicting union representatives from Turtle Bay, by illegally surveilling union representatives whenever the union representatives came to Turtle Bay, by illegally surveilling employees and union representatives who were engaged in peaceful demonstrations on the

public highway in front of Turtle Bay and on the public beach adjacent to Turtle Bay, by illegally denying union demonstrators and employees access to a public beach adjacent to Turtle Bay's property, by threatening to discipline employees who talked to union representatives at Turtle Bay, and by threatening to close Turtle Bay in retaliation for protected, concerted activity.

7. The Respondents violated Section 8(a)(5) and (1) of the Act by unilaterally changing the access provision of the collective-bargaining agreement, such as evicting union representatives from Turtle Bay, and preventing union representatives from collecting dues at Turtle Bay.

8. The Respondents violated Section 8(a)(5) and (1) of the Act because the Respondents failed and refused to bargain in good faith with the Union as the exclusive bargaining representative of the employees at Turtle Bay by refusing to provide information and by providing some information after an unreasonable and unlawful delay, information that was requested by the Union in separate letters on April 28, August 30, and September 13, 2004.

9. The Respondents violated Section 8(a)(3) and (1) of the Act by unlawfully discharging Mark Feltman, by unlawfully

suspending Timothy Barron, and by unlawfully disciplining Jeannie Martinson.

10. The foregoing violations constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondents will be directed to turn over to the Union the requested information described in this decision.

The Respondents having discriminatorily discharged an employee, they must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondents having discriminatorily suspended an employee, they must make him whole for any loss of earnings and other benefits arising from the suspension.

[Recommended Order omitted from publication.]